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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-776

NATIONAL LABOR RELATIONS BOARD
Respondent

v.

CITY WELDING & MANUFACTURING COMPANY
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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NATIONAL LABOR RELATIONS BOARD
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v.

CITY WELDING & MANUFACTURING COMPANY
~~Respondent~~ PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

City Welding & Manufacturing Company, petitioner, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on July 6, 1972, in which the court enforced the order of the National Labor Relations Board requiring the respondent to bargain with the International Association of Machinists and Aerospace Workers, District No. 106, AFL-CIO.

OPINIONS BELOW

The decision of the NLRB Trial Examiner issued February 26, 1971, requiring respondent to cease and desist from certain alleged conduct, reinstate with back-pay various employees and to recognize and bargain collectively with the Union, was adopted by the NLRB in its opinion dated June 14, 1971 and is reported at 191 NLRB No. 30 (Appendices A and B, *infra,* pp. 20, 101). The *per curiam* opinion of the United States Court of Appeals for the Third Circuit is reported at .... F. 2d .... (Appendix C, *infra,* pp. 103), and was filed on July 6, 1972.

JURISDICTION

The judgment of the Court of Appeals, Appendix D, *infra,* pp. 105) was entered on August 28, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The jurisdiction of the Court of Appeals was by virtue of 29 U.S.C. §160(e).

QUESTIONS PRESENTED

On the basis of an unfair labor practice charge filed by the International Association of Machinists and Aerospace Workers, District No. 106, AFL-CIO (hereinafter referred to as the "Union"), the National Labor Relations Board (hereinafter referred to as the "NLRB" or the "Board") found that the respondent had violated Sections 8(a)(1), (2), (3) and (5) of the National Labor Relations Act, as amended (29 U.S.C. §151, et seq.). The NLRB then filed a petition for enforcement of its Order with the United States Court of Appeals for the Third Circuit. The Company opposed, primarily, that portion of the Board's Order which required Union recognition and bargaining. That court granted enforcement of said Order. The questions presented for determination are:

1. Whether the standards enunciated by this Court in *NLRB v. Gissell Packing Co.*, 395 U. S. 575 (1969) concerning the validity of authorization cards are to be applied to cases involving dual-purpose recognition cards;

2. Whether there is a conflict in the circuit courts concerning the application of the "less extraordinary cases" standards enunciated in *NLRB v. Gissell Packing Co.*, 395 U. S. 575 (1969), requiring clarification by this Court;

3. Whether the Circuit Court erred in relying upon this Court's opinion in *NLRB v. Gissell Packing Co.*, 395 U. S. 575 (1969) in granting enforcement of an NLRB bargaining order where the Board's Order is premised

upon a Section 8(a)(5) violation and not upon independent Section 8(a)(1) violations;

4. Whether, in the alternative, the Circuit Court erred in granting enforcement of an NLRB bargaining order where the Board's findings and conclusions fail to meet the "less extraordinary cases" standards enunciated in *NLRB v. Gissell Packing Co.*, 395 U. S. 575 (1969); and

5. Whether the opinion by the United States Court of Appeals for the Third Circuit meets the standards for judicial review set forth by this Court in *Universal Camera Corporation v. NLRB*, 340 U. S. 474 (1951).

STATUTES AND RULES INVOLVED

The statutory provisions involved are: Sections 8(a)(1), (2), (3) and (5) and Sections 10(e) and (f) of the National Labor Relations Act. They are printed in Appendix E, *infra*, pp. 106.

STATEMENT OF THE CASE

The petitioner, City Welding & Manufacturing Company, is a Pennsylvania corporation, with its principal office located in New Castle, Pennsylvania, engaged in the manufacturing and non-retail sale of truck trailers. During the relevant period, the Employer employed sixty-one (61) people, not including higher-echelon supervisory personnel.

On or about January 29, 1970, the Union commenced an organizing campaign at the respondent's facilities in New Castle, Pennsylvania. On two widely-separate occasions during that campaign, City Welding & Manufacturing Company (hereinafter referred to as the "Company") admittedly engaged in various practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq., (hereinafter referred to as the "Act").

In the course of the hearing before the Trial Examiner, the Company challenged the validity of approximately twenty (20) of the Union authorization cards. The Trial Examiner's decision of February 26, 1971 concluded that the authorization cards were single-purpose cards and subject to the rules set forth in *Gissell Packing Co.*, 395 U. S. 575 (1969). He further found that the Union possessed thirty (30) valid authorization cards on June 19 and thirty-two (32) on June 22. The Trial Examiner then found that this number constituted a majority in an appropriate unit and that the Company had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union as requested. He held that the appropriate remedy was an order to bargain.

Statement of the Case.

On appeal to the National Labor Relations Board, the Board on June 14, 1971 adopted fully the findings of fact, conclusions of law and recommended order issued by the Trial Examiner.

On July 6, 1972, the United States Court of Appeals for the Third Circuit, in a *per curiam* decision, granted enforcement of the order to bargain issued by the National Labor Relations Board, expressly basing its decision on the holding of this Court in *NLRB v. Gissel Packing Co.*, 395 U. S. 575 (1969). On August 28, 1972, judgment was entered in this case.

The effect of the decision was to visit the sins of the Employer upon its employees, in that, through no fault of their own, the employees were being deprived of the opportunity to participate in a free, secret, NLRB-sponsored election which the record demonstates was the object of all their efforts.

On August 3, 1970, a date long after the alleged Section 8(a)(1) violations, a group of employees drove from their jobs in New Castle, Pennsylvania to the Board's regional office in Pittsburgh (approximately a 51-mile trip one way) to present a petition for an election to the Board's regional office.

One professional Union representative (Paul Harcar) spearheaded the campaign for the Union. Employees were visited at their homes, invited to meetings, and talked to in the plant. All were requested to sign a Union authorization card reading as follows:

> "I, the undersigned employee of (company) ..... authorize the International Association of Machinists and Aerospace Workers (I.A.M.) to act as my collective bargaining agent for wages, hours and working

conditions. *I agree that this card may be used either to support a demand for recognition or an NLRB election, at the discretion of the Union . . .*" (emphasis applied)

Between the dates of February 6 and June 22, 1970, Mr. Harcar received approximately thirty-five (35) signed authorization cards from the City Welding employees. As the validity of some of these cards is an issue in this litigation, the facts surrounding the receipt of these cards must be considered.

At least seven of the witnesses testified specifically that it was their understanding the cards were needed for the purpose of obtaining an election. (Crill, DeRosa, Antuono, Burns, Duddy, Jones and Marshall) Mr. Widelko specifically testified to his inability to understand the concept of the card bringing about representation without an election. Not one witness, except the professional Union organizer, was able to explain how a card check could result in automatic representation. Yet, all understood the manner in which the cards could get them a secret-ballot election.

At least three of the employees testified that they had not read the card before signing it. (Reno, Jones and Duddy) Two witnesses testified to signing the card as a result of threats and physical violence. (Duddy and Fundoots) Four witnesses testified that they had signed only after they were informed that a majority had already executed cards. (Reno, Evanoski, Haben and Tuscano) One witness testified that he had been advised he must sign a card in order to attend a Union meeting. (Tanner) And two witnesses testified that they had not dated the cards which were allegedly signed and dated in their own handwriting. (Forkey and Haben)

REASONS FOR GRANTING WRIT

1. This case raises an important question of federal law which has not been, but should be, clarified by this Court. In *NLRB v. Gissell Packing Co.*, 395 U. S. 575 (1969) (hereinafter referred to as "*Gissell*"), this Court enunciated its approval of the use of single-purpose Union authorization cards in connection with NLRB bargaining orders. The Court then identified three categories of cases: (1) exceptional, (2) less extraordinary, and (3) minor or less extensive, involving Section 8(a)(1) violations. *Gissell* dealt with approval of NLRB bargaining orders in category (2) cases. Provided that a showing has been made that at one point the Union had a majority the Board can use the bargaining order remedy in "less extraordinary cases" marked by less pervasive unfair labor practices which nonetheless have the "tendency" to undermine majority strength and impede the election processes.

However, the Court specifically declined to answer the question as to a situation where a dual-purpose authorization card has been employed despite the conflict among the circuit courts in that regard. See *NLRB v. Peterson Brothers*, 342 F. 2d 221 (5th Cir. 1965); *Bauer Welding & Metal Fabricators, Inc. v. NLRB*, 358 F. 2d 766 (8th Cir. 1966); *NLRB v. Lenz Company*, 396 F. 2d 905 (6th Cir. 1966); and *NLRB v. C. J. Glasgow Company*, 356 F. 2d 476 (7th Cir. 1966).

Although the Trial Examiner found that the card here was a "single-purpose" card and this finding was adopted by the National Labor Relations Board, the card, on its face, is nearly identical to that involved in the *Glasgow* case, *supra*, which was classified a dual-

purpose card. The Court of Appeals avoided the question of "single-purpose" versus "dual-purpose" cards, by finding merely that the card involved was not ambiguous.

The Court's language in *Gissell* would indicate that the decision as to lack of ambiguity does not necessarily result in the application of that decision to sustain a bargaining order. The Court made specific reference to cases involving dual-purpose cards, as being distinct from the situation then before it. In those cases, the cards concluded with a recital that it was "for use in support of the demand of (the union) for recognition or for an NLRB election". The card here is plainly such a card.

If this Court did not intend the application of *Gissell* to a situation involving dual-purpose cards, then both the Board and the Court of Appeals erred in applying the *Cumberland Shoe Corp.* (144 NLRB 1268) tests under the *Gissell* rationale. However, the frequent use of dual-purpose cards by labor unions and the existing conflict in that regard among the circuits makes it clear that standards concerning the effect of such cards in a bargaining order context should be enunciated.

The general sophistication of the signer is of vital importance in determining his understanding of a dual-purpose card. Here, the over-all picture which emerged from the testimony of a multitude of witnesses is that the employees desired, and believed they were working to obtain, an election. In fact, not one witness, except Mr. Harcar, was able to explain how a card check could result in automatic representation. And yet, all fully understood that the cards would get them a secret-ballot election.

Such a situation necessarily raises the presumption that their basic understanding was that an election had to precede Union recognition. This presumption is strengthened by the fact that the only contrary testimony was offered by the professional Union organizer himself and even he did not deny either that he told the employees that the card could be used to obtain an election (as is stated on its face) or that the alternate purpose of these cards was not clearly understood by those solicited.

The only thing which emerges from the total record with any certainty is that confusion reigned among the employees concerning the significance of the authorization cards. The only attempt to unscramble the question of the intent of the signers was that made by the Trial Examiner who chose to rely on the testimony of Mr. Harcar. Admittedly, he tells the clearest story. However, that is not surprising, since he is a professional Union organizer and virtually an expert in the matter of Union authorization cards. The petitioner would submit that having elected to utilize dual-purpose authorization cards, he assumed the duty of making absolutely clear that he was asking the employees to abandon their right to an election to him and his Union. It is clear from the employees' testimony that this was not done.

As the 2nd Circuit said in *NLRB v. S. E. Nickles Co.*, 380 F.2d 438 (2nd Cir. 1967):

> "This discourse was a long way from making plain to Mrs. Marks that if a majority was achieved, the union might assert that it had become the employees' exclusive bargaining agent without an election. The Trial Examiner did not discredit Mrs.

Marks' testimony but, because he thought it to be 'confused and conflicting', found it 'insufficient to overcome the effect of her overt action in having filled out and signed the card.' The testimony is clear enough to us: housewives working as sales ladies in discount stores are not to be charged with the learning of the Labor Board's trial examiners." 380 F.2d at 443.

The record overwhelmingly demonstrates that the employees as a whole believed they were participating in a campaign to obtain an election. Their testimony, their actions and their reactions to various events all point up this conclusion. That none of them understood the concept of direct recognition through a card check is equally clear. Therefore, none of the challenged cards can be said to have constituted a free or informed consent to direct representation by the Union.

2. Even assuming the card here is, in fact, a single-purpose card, or otherwise meets the requirements of *Gissell,* the standard of *Gissell* should be clarified.

Since *Gissell,* the Circuit Courts have differed substantially in its application. The Eighth Circuit, in *Arbie Mineral Feed Co. v. NLRB,* 438 F.2d 940 (8th Cir. 1971), while reiterating almost verbatim the language of this Court in *Gissell,* refused to sustain a bargaining order even though it sustained findings that the employer had violated Section 8(a)(1) of the Act by interrogating employees about their union activities and threatening them with economic reprisals for supporting the union as well as a violation of Section 8(a)(3) for the discharge of an employee for union activity. The Court based its denial on the finding that the illegal conduct

in question exerted a "minimal impact on the election machinery". Similarly, in *NLRB v. Hart Beverage Co.*, 77 LRRM 2715 (8th Cir. 1971), the Court denied enforcement of a bargaining order on similar grounds even though sustaining violations of Sections 8(a)(1) and (5). These and other cases indicate that the primary consideration of the 8th Circuit in determining whether or not to uphold a bargaining order is based on the degree of impact which the unfair labor practices had on the employees' allegiance to the union.

In *L. C. Cassidy & Son, Inc. v. NLRB*, 415 F.2d 1358 (7th Cir. 1971), the Seventh Circuit indicated that an affirmative showing must be made that a union majority was in fact dissipated by unfair labor practices. This establishes a burden of proof different from that in the Eighth Circuit where it would appear necessary to affirmatively prove that the violations did not have much of an impact on employee union allegiance.

The Fifth Circuit's position is best set forth in *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir. 1970), where the court refused to enforce a bargaining order on the basis of the Board's failure to make specific findings that:

> A) The union had valid authorization cards from a majority of the employees in an appropriate bargaining unit;
>
> B) The employer's unfair labor practices, although not "outrageous" and "pervasive" enough to justify a bargaining order in the absence of a card majority, were still serious and extensive;
>
> C) The possibility of erasing the effects of past practices and of insuring a fair election by the

use of traditional remedies, though present, is slight; and

D) That the employee sentiment could best be protected by a bargaining order.

The Court also took specific issue with the Board's failure to discuss and make findings concerning the contemporary necessity for a bargaining order and stated that *Gissell* required the Board to find that a fair election was unlikely due to the unfair labor practices committed in order to sustain or enforce a bargaining order. (427 F. 2d at 448)

The Sixth Circuit, on the other hand, has adopted an attitude of almost complete acquiescence to the Board's opinion of its own power to issue a bargaining order. The conclusion to be drawn from the cases in that circuit is that, absent some outrageous misuse by the Board of its bargaining order power, the Sixth Circuit will enforce any bargaining order without inquiry into the Board's power in this area. See *NLRB v. Production Industries, Inc.*, 425 F. 2d 1206 (6th Cir. 1970) and *NLRB v. Mink-Dayton, Inc.*, 426 F. 2d 255 (6th Cir. 1970).

Like the Sixth Circuit, the Second Circuit will bow to the Board's expertise in determining the need for a bargaining order unless a clear misuse of that power is suggested by the record. See *NLRB v. International Metal Specialties, Inc.*, 433 F. 2d 870 (2nd Cir. 1970).

The Fourth Circuit will enforce a bargaining order where the Board's findings show that Section 8(a)(1) violations are so frequent as to preclude a fair election. See *NLRB v. Kane d/b/a Kane Bag Supply Co.*, 435 F. 2d 1203 (4th Cir. 1970).

And the Tenth Circuit, like the Second and the Sixth, perfunctorily enforces a bargaining order unless an abuse of discretion is patent in the record with no consideration of any limitations established by this Court in *Gissell*. See *NLRB v. Wylie Manufacturing Co.*, 417 F. 2d 192 (10th Cir. 1969).

Presumably, one of the primary considerations of this Court in issuing its decision in *Gissell* was to establish uniform criteria for determining the validity of an order to bargain issued by the NLRB. This, of course, is in keeping with the attempt on the part of Congress and the federal courts to develop a uniform body of federal labor law. As has been demonstrated above, the application of this case has created a situation where different standards are applied in different parts of the country. In the Eighth Circuit, the Board must establish that a free election is virtually impossible at the time, while in the Second Circuit, the Board's discretion is virtually unchecked. The decision of the Court of Appeals here effectively ignores the statements of this Court that such an order should be issued only when the possibility of insuring a fair election is slight. 395 U. S. at 614. Such a conclusion denies the right of the employees to express their choice by secret ballot.

3. The instant case raises the preliminary question of whether *Gissell* applies at all. The Trial Examiner issued his bargaining order based upon the Section 8(a)(5) violation. (App. A).

While it is true that the Trial Examiner earlier in his decision makes a finding concerning Section 8(a)(1)

conduct, it was not utilized as the basis for the bargaining order.[1]

Having premised the remedy upon the Section 8(a)(5), the Board and Court erred in applying *Gissell.*

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1. In *Sinclair Company,* decided wih *Gissell,* the NLRB bargaining order read:

> "Having found that Respondent refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, I will recommend that, upon request, Respondent recognize and bargain collectively with the Union as the exclusive representative of all its employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. *Moreover, I would recommend the same bargaining order even if the record had warranted the conclusion, contended for by Respondent, that it relied on a bona fide doubt of the Union's majority in refusing to bargain with the Union. As previously found, the Union represented a clear majority of the journeymen wire weavers when Respondent began its unlawful campaign directed at destroying that majority. To the extent that the election revealed a loss of union support thereafter, such loss must be found attributable to the Respondent's unfair labor practices. Therefore, effectuation of the policies of the Act would still require such a bargaining order in order properly to remedy Respondent's other unfair labor practices herein found.* (Footnote omitted) (emphasis added) 164 NLRB at 269.

No such remedial language is found in the instant case. It reads:

> "Having found that the Union represented a majority of Respondent's employees in an appropriate bargaining unit and that its demands for recognition and bargaining were unlawfully refused, I shall recommend that the Company be

4. But, even assuming that the Board is correct in invoking *Gissell,* it is clearly a category (2) "less extraordinary" standard which it should have applied.[2]

In the instant case, neither the Board nor the Court of Appeals made any findings as to whether or not the unfair labor practices had created an atmosphere in which any remedy short of a bargaining order would be ineffective in permitting a fair and free election. The Trial Examiner, and the Board, based the bargaining order solely on the violations of Section 8(a)(5) in that the Company had unlawfully refused to bargain with the Union in response to the Union's demands at a time when it represented a majority of the Company's employees. The Court of Appeals considered only the question of possible ambiguity in the authorization card and the question as to whether or not the unfair labor practices occurred. Its decision does not reflect any consideration of the possibility that a free election could be held at this time.

The record, taken as a whole, plainly indicates that rather than reducing Union support, the loyalty of the employees to the Union actually increased as a result of the alleged unfair labor practices. The initial denial of recognition resulted in a massive strike. A return to

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ordered to bargain, upon request, with the Union and to embody any agreement reached in a written signed agreement.

"Respondent's unfair labor practices indicate an attitude of opposition to the purposes of the Act generally. *Accordingly, a broad cease-and-desist order is necessary and appropriate to effectuate the policies of the Act.*" (emphasis added)

2. See discussion, *supra,* page 9.

work followed an agreement that there would be an election. The termination of four employees resulted in a further work stoppage. And as late as August, 1970, over one-third of the Company's employees drove over a hundred miles to request the NLRB to grant a representation election.

As the Eighth Circuit said in *NLRB v. Crystal Tire Co.*, 410 F. 2d 916 (8th Cir. 1969):

> "In order to sustain the use of a bargaining order in this case, the record must support the finding that Union support among the majority of the employees was materially diminished by the employer's interference with the employees' unionization efforts."

Not only was no such finding made in the instant case, either by the Board or by the Court of Appeals, the record would clearly not sustain such a finding.

5. In *Universal Camera Corporation v. NLRB,* 340 U. S. 474 (1951), this Court set forth the standards required of courts of appeals in reviewing decisions by the Labor Board. In that decision, this Court pointed out that the question as to whether or not the record as a whole presents substantial evidence to support the agency's findings has been placed by Congress in the keeping of the courts of appeals. An examination of the opinion rendered by the Court of Appeals here plainly indicates that that standard has not been met.

In order to determine the validity of the bargaining order issued by the Board, the existence of substantial evidence on several questions must be considered:

1) Was the authorization card ambiguous?;

2) Was the authorization card a single-purpose or dual-purpose card?

3) Did the signing employees understand the effects of their action in executing the card?;

4) What was the appropriate size of the bargaining unit?;

5) Did the Union, at any time, represent an uncoerced majority of the employees in that unit?;

6) Were unfair labor practices committed by the Company?;

7) Did such unfair labor practices undermine the Union majority and/or Union support among the employees?;

8) Did such unfair labor practices render the possibility of a free election slight at best?

In rendering its decision, the Court of Appeals here considered only two of those questions. The mere fact that, as the Court of Appeals found, unfair labor practices had been committed and that an unambiguous card existed would not, under the ruling in *Gissell* on which both the Court of Appeals and the Board relied, be sufficient to sustain a bargaining order without the other enumerated factors.

By basing its decision only on the findings as to those two issues, the Court of Appeals has made no attempt to fulfil its obligations as a reviewing body as expressed in *Universal Camera Corp.* It permitted the findings of the Board concerning the size of the appropriate unit, the validity and type of the cards obtained, the effect of the unfair labor practices on the Union's majority

status, the fact of the existence of such a majority status prior to the time of a recognition demand and the possibility of holding a fair election stand without any review as to whether they mere supported by a substantial weight of the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Company

APPENDIX A

TXD—68—71
New Castle, Pa.

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

CITY WELDING & MANUFACTURING COMPANY and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT NO. 106, AFL-CIO and EMPLOYEES GRIEVANCE COMMITTEE Party in Interest	Case 6—CA—5019

STANLEY R. STEIN, ESQ., and STEPHEN RICHMAN, ESQ., Pittsburgh, Pa., for the General Counsel.

JAMES O. HARTY, ESQ., REED, SMITH, SHAW & MCCLAY, ESQS., Pittsburgh Pa., for the Respondent.

MR. PAUL M. HARCAR, New Castle, Pa., for the Charging Party.

Trial Examiner's Decision

ARTHUR M. GOLDBERG, Trial Examiner: Based upon a second amended charge filed on July 15, 1970,[1] by International Association of Machinists and Aerospace Workers, District No. 106, AFL-CIO (herein called the Union, the Machinists, or the Charging Party), the complaint herein issued on August 31 alleging that City Welding & Manufacturing Company (herein called City Welding, the Company, or the Respondent) violated Section 8(a) (1), (2), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act). The alleged violations of Section 8(a)(1) consisted of creation of the impression of surveillance of the employees' union activities; promises of wage increases if the employees refrained from union activity. threats of plaint closure; loss of employment and of a reduction in wages if the employees selected the Union as their bargaining representative; interrogation of the employees concerning their own union activities and those of their fellow employees; requests that the employees sign a disavowal of the Union; and, requests that the employees return their union authorization cards to the Respondent. The Company allegedly violated Section 8(a) (2) by initiating and promoting the Employees Grievance Committee; allowing the Committee to use plant facilities during working hours to conduct its meetings; providing its facilities for the conduct of the election of the Committee's representatives and permitting the employees to vote for those representatives during working hours; urging the em-

1. Unless otherwise noted all dates herein were in 1970. The original charge was filed on May 13 and the first amended charge was filed on July 10.

ployees to negotiate and process grievances through the Committee, rather than through the Union; and, dictating the form and structure of the Committee, and the qualifications, duties, term of office and method of election of Committee representatives. The putative violations of Section 8(a)(3) consisted of the discharges of Edward Callahan on February 6 and Albert Lengyel on February 12 and the discharges of eight named employees on or about June 22. Finally, the Company was alleged to have violated Section 8(a)(5) by refusing to recognize and bargain with the Union on June 22, although the Union was the duly authorized bargaining representative of the employees.

In its answer the Company admitted the filing and service of the charges, the commerce data spelled out in the complaint, and the labor organization status of the Charging Party. The answer denied all other allegations of the complaint.

Prior to the hearing the General Counsel advised the Respondent of his intention to amend the complaint by alleging the supervisory status of eight alleged foremen. At the hearing the General Counsel amended the complaint to allege that the Respondent further violated Section 8(a)(1) by the announcement and subsequent grant of a wage increase in June or July.

During the hearing the Company withdrew its denial to certain allegations of the complaint. The allegations thus admitted are:

> 6. Respondent, by its officers, agents and representatives, at its New Castle, Pennsylvania, plant, has interfered with, restrained and coerced, and is

interfering with, restraining and coercing, its employees in the exercise of their rights guaranteed in Section 7 of the Act by the following acts and conducts:

* * * * * * *

(e) By Anthony Marinelli, Jr., in February 1970, threatened employees with plant closure if they selected the Union as their bargaining representative.

* * * * * * *

(g) By Harry Colucci, in February 1970, threatened employees with lower wages if they selected the Union as their bargaining representative.

(h) By Harry Colucci, Anthony Marinelli, Sr., Ronald Duda, Anthony Marinelli, Jr., and Michael Pietro in February, and by Joseph Marinelli in the months of February and June 1970, interrogated employees concerning their Union membership, activites and sympathies, and the Union membership, activities and sympathies of their fellow employees.

* * * * * * *

(j) By Joseph Marinelli, Ronald Duda and Michael Pietro in February 1970, requested employees to return their Union authorization cards to Respondent.

As to the Section 8(a)(3) violations, the Company withdrew its denial that it had discharged Callahan and Lengyel but reiterated its contention that those terminations were not in violation of the Act. With respect

to the discharge of eight employees[2] on June 22 and 23, the Company admitted "that the named individuals . . . were discharged because they engaged in a work stoppage or strike."

Respondent admitted at the hearing that it had "promoted" the Employees Grievance Committee and "that they conducted an election on our premises."

Finally, it was stipulated at the hearing that all or substantially all the employees received a pay raise from the Respondent which was paid to them on or about July 2.

All parties participated in the hearing in New Castle, Pennsylvania, on October 22 and 23 and October 28, 29, and 30 and were afforded full opportunity to be heard, to introduce evidence, to examine and cross-examine witnesses, and to present oral argument. Oral argument was waived and briefs were filed by General Counsel and the Respondent.

Based upon the entire record[3] in the case, my reading of the briefs, and from my observation of the witnesses and their demeanor, I make the following:

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2. Clair Catterson, William Summerville, Robert Jones, Walter Korab, Frank Genareo, Joseph Todd, Randy Rubeis, and Donald Macarella.

3. On December 4 General Counsel filed a Motion to Correct Transcript of the hearing in certain specified respects as set forth in said motion. On December 8 I issued an Order To Show Cause on or before December 21 why the corrections set forth in General Counsel's motion should not be made. There were no responses to said Order To Show Cause. Accordingly, General Counsel's Motion to Correct Transcript is granted and General Counsel's motion (hereby marked TX Exh. 1) and the Order To Show Cause (hereby marked TX Exh. 2) are received in evidence as exhbits in this proceeding.

Appendix A—Trial Examiner's Decision.

FINDINGS OF FACT

I. The Business of the Respondent

City Welding & Manufacturing Company, a Pennsylvania corporation with its principal office in New Castle, Pennsylvania, is engaged in the manufacture and nonretail sale of truck trailers. During the year preceding issuance of the complaint the Company shipped goods and materials valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania.

The complaint alleged, Respondent admitted, and I find that the Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and meets the Board's standards for assertion of its jurisdiction.

II. The Labor Organizations Involved

International Association of Machinists and Aerospace Workers, District No. 106, AFL-CIO, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

The Employees Grievance Committee (herein called the Committee) came into existence on June 23 under circumstances fully discussed below in section III, H, of this Decision. That same day the three committeemen who had been elected by the employees to represent specified sections of the plant held their first meeting with Joe Marinelli, Respondent's president. Constant Evanoski III testified that he was one of the original committeemen. While he was on the Committee there were at least five meetings with Joe Marinelli. Evanoski

testified that all new employees automatically became members of the Committee when hired. Although there was no document prepared describing the Committee, the committeemen defined its purpose to the men in the shop. There were no dues collected and the Committee had no expenses. The committeemen informed the men about their discussions with Joe Marinelli.

Evanoski testified that "we would go in and bargain for the guys." Among the subjects discussed with the Company's president were wages, a pension plan, vacations, Saturday overtime, and existing shop problems. On the subject of wages Joe Marinelli asked the Committee representatives for their opinion as to what the men wanted. Marinelli testified that he talked to the Committee before granting the July wage increase. In connection with their discussions about wages the Committee representatives did research on what other employers in the New Castle area were paying. In the course of these discussions Joe Marinelli set the wage for foremen at $3.45 an hour, but, Evanoski testified, it was not the Committee's job to negotiate for the foremen.

The Committee, an "employee representation committee," in which the employees participated by election and membership, exists for the purpose of dealing with Respondent concerning the employees' wages and such conditions of employment as overtime, vacations, and a pension plan. Accordingly, I find that the Committee is a labor organization within the meaning of Section 2(5) of the Act.[4] *N.L.R.B. v. Cabot Carbon Company,* 360

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4. Sec. 2(5) of the Act, 61 Stat. 138, 29 U.S.C. Sec. 152(5) provides: "The term 'labor organization' means any organization of any kind, or any agency or

U.S. 203; *Pruden Products Company,* 170 NLRB No. 32, enfd. 422 F.2d 855 (C. A. 7).

III. The Unfair Labor Practices

A. *The Unit and the Supervisory Personnel*

The complaint alleged and at the hearing the Respondent stipulated that

> All production and maintenance employees employed at the Respondent's New Castle, Pennsylvania, plant, excluding office clerical employees and guards, professional employees and supervisors as defined in the Act

constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Pursuant to a subpena served by General Counsel calling for production of a list of employees in the unit as of the time the Union demanded recognition, the Respondent furnished a list of 67 names. By agreement of the parties seven names were dropped because those employees had been hired subsequent to the demand for recognition and a 61st name, omitted by inadvertence, was added. However, as to 8 names[5] on the revised list of 61 names, the parties are in sharp disagreement as to whether they should properly be included in the unit,

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employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

5. Patsy Circelli, Frank DuBois, Ron Kukich, William Forkey, Edward Hallowich, Donald Cochran, David Hallowich, and Donald MacIntyre.

General Counsel contending, pursuant to his amendment to the complaint, that the 8 are foremen and supervisors within the meaning of the Act, and Respondent taking the position that the contested 8 are keymen, employees who are not possessed of supervisory authority.

Testimony was offered as to the duties of the eight individuals in general and, as to certain of the eight, there was testimony concerning those individuals by name. Both in his testimony during the course of the hearing and in his pretrial affidavit, Joseph Marinelli, Respondent's president, stated that all of these eight individuals, whom he characterized as "keymen," were possessed of the same authority over the men in the respective departments. In determining the supervisory status of the eight contested employees the testimony as to specific named individuals is considered first.

1. Edward Hallowich

Walter Korab, employed in the flatbed department to which Edward Hallowich is assigned, testified that he receives all of his work assignments from Edward Hallowich and that he takes any on-the-job problems to Hallowich who checks Korab's work. Korab testified that when he had improperly performed work he was spoken to by Edward Hallowich who showed Korab how to do the work properly and that Korab then redid the work. Further, Korab stated that if he runs out of work he goes to Edward Hallowich, whom he regards as his foreman, for a new assignment. Korab testified that Edward Hallowich received the written work orders for the flatbed department. As to other supervision in

the flatbed department Korab testified that Harry Colucci, plant superintendent, spent 5 minutes to one-half hour a day in the department.

Both Korab and Constant Evanoski testified that Edward Hallowich spends the major part of the day on production work.

Evanoski testified that it was Edward Hallowich who conducted the election for representative to the Employees Grievance Committee. At that time Hallowich stated that foremen would not be allowed to participate in the vote for committee representative. Hallowich did not vote in that election.

Edward Hallowich, one of the two alleged foremen who testified in the proceedings,[6] described his work in the following words "I work in the chassis department. I lay out frames and I help the men work and I work right along with them, correcting any mistakes that's made." Hallowich punches the timeclock, is paid $3.45 per hour as are all of the eight keymen, has never been told that he has authority to hire, to fire, or to give a wage increase, received a Christmas bonus of $300 in 1969, and, as he stated, "gets the same as any other man except he gets a little more money than the next guy." Hallowich testified that he has been asked by management whether an employee was doing a good job. During the course of a day, as the need arises, Hallowich will ask men to move from one task in the department to another. As an example, Hallowich testified that Plant Superintendent Colucci will tell him that a certain trailer must go out right away and that Hallowich will then move men to work on that particular trailer. At

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6. Patsy Circelli also testified.

the start of work in the morning the men in the department come to Hallowich who lays out the work they are to perform that day. Hallowich denied that he was responsible for what the men in the department do. He did testify that if the men don't do their work right they usually come to him and that where he sees a man "goofing off" he tells that man to get on the job and if they don't do their work Hallowich then reports this to Colucci who straightens out the matter. As to Colucci's time in the chassis department Hallowich testified that the plant superintendent spent "an hour, 2 hours, sir, coming and going."

2. DONALD COCHRAN AND DAVID HALLOWICH

Cochran and David Hallowich share responsibility for operation of the Company's service department. The service department, employing some 15 persons, handles the repairs of damaged trailers rather than the manufacture of new products. The service department is physically separated from the rest of the plant by a wall. Cochran and David Hallowich each spend a week in turn supervising the operations of the service department. Edward Callahan credibly testified that during the week Cochran or David Hallowich run the department they do not perform any production work. During that week they walk through the department seeing that the work is being properly performed, assigning tasks, inspecting the work, and keeping the men on their job. Callahan testified that if he had trouble on the job he would consult with either Cochran or David Hallowich, whoever was on duty that week, that he had been told a number of times by the supervisor of the week to do work over, and that he had been shifted around to jobs

in the department just about every day by the supervisor on duty. Further, Callahan testified that the supervisor on duty talks to employees about safety conditions and corrects the way employees use pieces of equipment. Callahan has been asked to work overtime by David Hallowich, Cochran and on occasions by Anthony Marinelli. As to other supervision in the service department Callahan testified that Plant Superintendent Colucci spends perhaps 15 to 20 minutes a day in the department, walking through; Joseph Marinelli is in the department perhaps 1 hour in the day; Anthony Marinelli is present for about an equal amount of time; and, Marinelli, Sr., is in and out of the department during the day for a total of perhaps an hour of time.

Cochran and David Hallowich share a desk which they use to write work orders and, Callahan testified, he has seen the two handling timecards.

Neither Cochran nor David Hallowich testified.

3. Frank DuBois

DuBois is assigned to the fabrication department which produces parts for use in the other sections of the plant, Constant Evanoski testified that DuBois directs the employees in the fabrication department as to the work to be done, assigns work to them, corrects improperly performed work, shows the employees how to properly perform their tasks, and reprimands employees who are slacking up on the job. Evanoski testified that it was usual for DuBois to ask the men if they would stay to do overtime work. Evanoski estimated that DuBois spent 90 percent of his time in physical work.

DuBois did not testify.

4. William Forkey

Forkey is assigned to the chassis department. Employees William Summerville and Frank Genareo testified that work was assigned and checked by Forkey and that they would take any problems on the job to Forkey. Genareo testified that on occasion he has been told by Forkey to get moving or to get back to work. Further, Genareo has been shifted by Workey from job to job within the department. Summerville and Genareo agreed that Forkey performs little production work during the day, an hour at the most. As to other supervision in the department the two employees agreed that Plant Superintendent Colucci spent no more than one-half hour a day in the chassis department and that Marinelli, Sr., and his two sons spend little time there.

William Forkey did not testify.

5. Patsy Circelli

Circelli is assigned to the body department. Albert Lengyel testified that the employees received their job assignments from Circelli in the morning and that he reassigned them during the day if they ran out on work. Circelli checks the work and on occasion has told Lengyel to redo work he has performed. Lengyel testified that if he has a problem on the job he goes to Circelli; that Circelli has told employees to stop kidding around and to get back to work; that he has been asked by Circelli to work overtime; and that he has seen Circelli initial a timecard when an employee failed to punch the card at the timeclock. Lengyel testified that Circelli works perhaps 1 hour out of the day at production tasks.

Circelli testified that he is a welder, fitter, and

helper in the body department who works with tools all day. Circelli clocks in at the timeclock, is paid $3.45 per hour, has never given a raise to an employee, does not have authority to grant a pay raise, has never hired nor fired and does not have authority to do so.

Circelli was asked if he had ever been told he had a job title and answered that he was just a worker. Subsequently Circelli stated, "I'm like a keyman—." It later developed that Circelli had first heard the term "keyman" in consultation with Respondent's counsel the morning of his appearance as a witness in this proceeding.

Circelli testified that he does not run the department but if men have finished their jobs they ask him what to do and he tells them what they should be working on. Circelli stated that no one had ever refused to do what he had told them to do.

General Testimony

As earlier noted Company President Joseph Marinelli stated that the eight putative foremen all were possessed of the same authority over the employees in their respective departments.

Constant Evanoski testified that, at the time elections were conducted to select representatives to the Employees Grievance Committee, Edward Hallowich who was running the election stated that everyone was eligible to vote except the foremen. Hallowich did not vote.[7] Employee Timothy Burns testified that Cochran

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7. Edward Hallowick, who testified subsequent to Evanoski's appearance in these proceedings, did not allude to the election and did not controvert Evanoski's testimony.

and David Hallowich were present during the election but did not vote. During the wage negotiations between the Committee and Joseph Marinelli the foremen's wage was raised to $3.45 but, Evanoski testified, this rate was set by the company president and it was not the Committee's job to negotiate for the foremen. This wage rate applied to the eight named alleged foremen.

Joseph Marinelli testified at length concerning the duties and status of the eight named individuals. Joseph Marinelli was a totally incredible witness. Based on my observation of his demeanor while testifying, the contradictions between his testimony and the sworn statement he had given prior to trial, and the inconsistencies in his testimony, I credit Joseph Marinelli only to the extent that specific statements made by him are corroborated by other credited witnesses. However, certain statements by Joseph Marinelli are significant in determining the status of the alleged foremen because they in effect constitute admissions against interest. Thus, Marinelli testified that Circelli is the "job supervisor" in the body department, DuBois "more or less" heads up the parts department and the men go to DuBois, and in the service department Cochran and David Hallowich share the duties and place the men and take care of work orders. Marinelli stated that when a man in the department is finished with his job the "keyman" can tell him to do another job. On the subject of wage increases for the employees Marinelli first testified that when a "keyman" feels that an individual should have a raise he will tell Marinelli. However, Marinelli stated this was just a suggestion and he determines whether the raise should be given. Shown his affidavit which reads in pertinent part, "If the key man says the man is ready for

a raise, I take his word for it." Marinelli then stated, "I take his word for it; but maybe not at that particular time do I then give them the raise." Marinelli testified that the keymen try to discipline the employees and can move the men from place to place in their department. Keymen are paid $3.45 per hour while production and maintenance employees are paid within a range from $2.35 to a top of $3.25 per hour. The plant area is about 60,000 square feet with a total employment of approximately 85. Marinelli insisted that Colucci, the plant superintendent, is "absolutely" the only one in charge.

CONCLUSION

All things considered, I find that the eight named individuals[8] are supervisors within the meaning of the Act. It has been held that "the possession of any one of the authorities listed in § 2(11) [of the Act] places the employee invested with this authority in the supervisory class" for that "section is to be interpreted in the disjunctive."[9] Based upon employee and keymen testimony

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8. See fn. 5.

9. *Ohio Power Company v. N.L.R.B.*, 176 F.2d 385, 387 (C.A. 6), cert. denied 338 U.S. 899 Sec. 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

and Joseph Marinelli's admissions, it is clear that the keymen have authority to transfer and assign employees, can effectively recommend wage increases, and can discipline employees or effectively recommend such action. If Marinelli's testimony that only Colucci is a plant supervisor is to be believed, Respondent's plant employing some 85 persons is operated with only one supervisor. I cannot credit Respondent's position that a multidepartment plant of 60,000 square feet, with one department, the service department, physicaly separated from the general area by a wall, operates without on-the-scene supervision supplied by the keymen. Moreover, Respondent's action in baring the keymen from voting in the election for employee representatives to the Committee is evidence of the Company's recognition that the keymen are foremen and not simply employees. Additionally, the keymen are paid 25 cents more than the highest paid employees, the wage rate for keymen was not a subject for negotiation between Marinelli and the Committee representing the employees, and certain of the keymen do little or no production work. *Walker-Roemer Dairies, Inc.*, 186 NLRB No. 66.

I find therefore that at the time of the Union's demand for recognition there were 53 employees in the bargaining unit.[10]

B. The Union's Organizing Campaign

The Union's organizing campaign among Respondent's employees commenced on or about January 29, when Paul Harcar, the Union's business representative, contacted Edward Callahan, a company employee, in re-

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10. See Appendix A.

sponse to Callahan's inquiries about organizing directed to a union official. Harcar met with Callahan at the latter's home that evening and after a discussion about employee interest in organizing Harcar suggested that Callahan compile a list of employee names and addresses to be used in a union mailing. Harcar left a union authorization card and some union literature with Callahan that evening. Callahan and Harcar met for a second time at Callahan's home on or about February 3. At that time Callahan had compiled a partial list of the employees, some 15 names, and told Harcar that he would have a list containing a majority of the names within a few days. On February 5, Callahan gave Harcar a fairly complete list of employee names and addresses and that evening Harcar mailed to about 35 employees a packet containing a letter from the Union, a union authorization card, a postpaid return envelope, and a piece of organizing literature.

The folowing day, February 6, Respondent launched a campaign to induce the employees to turn into the Company the authorization cards they had received from the Union.

At the hearing the parties entered into the following stipulation:

> On February 6 and 7, 1970, Harry Colucci, plant superintendent, during working hours called a substantial number of employees to the plant office and there asked the employees to give him authorization cards received from the Union.

Among the employees who testified that they had been thus approached to give their authorization cards

to the Company were William Korab, Curtis Crill, Randall Rubeis, Constant Evanoski, Frank Genareo, and Edward Calahan.

After quitting time on February 6, Callahan called Harcar to say that he had been discharged.

On February 11, Harcar and Owen Muffler met employees Albert Lengyel and Ed Bucker outside Callahan's home. At that time Lengyel gave Harcar authorization cards signed by Louis Napolitano and Michelle Schettino and arrangements were made for a meeting to be held in Harcar's office that evening. Nine employees attended the meeting.[11] After Muffler gave a talk on the history of the Union and a general discussion of conditions at City Welding and employees interest in union representation, most, if not all, at the meeting expressed a willingness to solicit for the Union. Harcar told the men assembled that once a majority of the employees had signed union cards he would so notify the Company and request recognition through a card check. Harcar explained the operation of a card check stating that an impartial third party such as a clergyman or Federal or state mediator would check the cards against a list of employees submitted by the Company to determine whether the Union had a majority. Curtis Crill testified that at this February 11 meeting only a card check was discussed and there was no mention of an election.

On February 26 the Union handbilled the company plant at quitting time. Leaflets were distributed by Har-

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11. Lengyel, Ed Bucker, Clair Catterson, William Summerville, James Burke, James DeRosa, John Widelko, and Curtis Crill.

car, Muffler, Lengyel, Callahan, and Earl Nyman, president of a union local lodge. While the handbilling was taking place Joseph Marinelli, company president, Harry Colucci, plant superintendent, and Johnson, a company salesman, stayed outside the plant watching the handbilling and the employees leaving the plant.

On June 17 employees William Summerville, Robert Jones, and Anthony Fundoots came to Harcar's office. At that time Summerville gave to Harcar 11 or 12 signed authorization cards. Based upon his impression of the composition of the bargaining unit Harcar believed that these additional cards gave the Union majority status and on June 19, by certified mail, Harcar sent a demand for recognition. The return receipt for this certified demand for recognition was dated June 20 and signed by Joseph Marinelli.

C. The Discharge of Edward Callahan

Callahan was first employed by the Respondent for about 5 years before leaving in November 1968 for a better job. Callahan returned to Respondent's employ on May 12, 1969, after a conversation with Joseph Marinelli in which Marinelli asked if Callahan wished to return to City Welding. Callahan replied that he would return if given a substantial raise. Marinelli agreed to pay Callahan $3 an hour and restore all of his prior seniority.

At Christmas time 1969, Marinelli loaned Callahan $100 without interest. In January 1970 Callahan received a 10-cent-per-hour wage increase. In late January Callahan was given a 3-day layoff for failing to report in that he was out sick.

Late in January Callahan initiated the Union's organizing campaign, held several meetings with Harcar, the Union's representative and compiled, with the assistance of Albert Lengyel and James Burke, the list of names and addresses used for the Union's February 5 mailing of campaign literature and authorization cards. On February 5 Callahan signed a union authorization card. This was the second card that Callahan signed, something having gone awry with the first card he signed.

On February 6 Callahan was about 1 hour late for work. When Plaint Superintendent Colucci asked if Callahan had been late and the latter replied that he had, Colucci laughed and said, "You'll never change." Callahan explained to Colucci that his lateness was caused by trouble with his truck.[12]

As noted above, on February 6, Respondent engaged in a major effort to induce the employees to turn into the Company the union authorization cards which had been mailed to them. Employee Frank Genareo testified that when, on February 6, Colucci asked if Genareo had received a union card the plaint superintendent also inquired as to whether anyone had asked for Genareo's name and address. Genareo testified that Colucci then asked, "Did Eddie Callahan say anything to you?"

At about 3:15 p.m. on February 6, Callahan was called to the parts office. There Colucci, with Service Department Foreman Donald Cochran and David Hallowich present, showed Callahan the Union's mailing and

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12. Colucci did not testify in these proceedings and Callahan's testimony as to his conversation with Colucci stands unrebutted, as does any testimony referred to in this Decision which concerns Colucci's activities.

asked if Callahan was familiar with it. When Callahan said he was not Colucci asked that he read the material. Colucci explained that the mailing was to organize a union at City Welding and that a union was not needed there, the people were happy without one. Colucci asked Callahan to give him a card if one was received in the mail. Callahan said that he would. The plant superintendent then asked if Callahan knew anything about the mailing, and the latter denied any knowledge.

At about 3:45 p.m. while Callahan was working under a trailer, he was approached by Joseph Marinelli and Colucci. Marinelli asked if Callahan had anything to do with the Union's organizing effort. When Callahan denied knowledge of the campaign Marinelli said, "Well, you're a liar. I have two guys who says you were getting names and addresses." At that point Callahan admitted his activity and the company president stated that he had to let Callahan go. When Callahan stated that he would fight the discharge Marinelli said he was not firing Callahan because he was trying to get the Union in but because he had reported late for work that morning. Marinelli, Colucci, and Callahan then engaged in a discussion of shop conditions for about 15 or 20 minutes during which talk Marinelli asked why Callahan wanted to bring the Union into the plant. After Marinelli left the group Colucci offered to talk to Marinelli in an effort to have premium payments continued on Callahan's hospitalization insurance, so that benefits could be obtained when the baby the Callahans were expecting was born, if Callahan would tell Harcar to "lay off this union stuff."[13]

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13. This account of Callahan's discharge interview

On February 12 Joseph Marinelli told Lengyel and Larry Marshall of his $100 loan to Callahan and stated that Callahan had turned around and stabbed him in the back. Marinelli repeated the "stab in the back" phrase while discussing Callahan with Harcar on February 23 and June 22. Marinelli added that "no maggot like Ed Callahan [was] going to run his business." On February 23 Marinelli told Harcar that the majority of his employees did not want a union and that it was only the lazy ones who didn't want to work, in which number he included Callahan, who wanted a union.

Callahan participated in the February 26 handbilling of the company plant. In March Callahan met Joseph Marinelli at which time Marinelli said that he had been planning to call Callahan back but that Callahan was still making trouble for Marinelli. Also in March Callahan had a conversation with Colucci in which Colucci stated that he thought he could get Callahan back to work at City Welding. When Callahan expressed the

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is based upon his credited testimony. Colucci did not testify. Marinelli, whom I credit only when corroborated by a credited witness, claimed that Callahan had the worst record of all of Respondent's employees, that he had been warned consistently about being late for work, a condition which had persisted from "whenever he started there," and that Callahan had been accused of taking equipment from the shop. Additionally, Marinelli sought to connect Callahan with the slashing of seats and tires of employees' cars. It later developed that this last incident had occurred prior to Christmas 1969, was in no way connected with the Union's organizing campaign, and that there was no evidence connecting Callahan with the incident. Marinelli claimed that he had been talking to Colucci for probably a month about discharging Callahan. The discharge took place on February 6. Callahan received a wage increase on January 10.

opinion that he should be paid for the time he was off Colucci said that he would never get that. Callahan stated that he would be glad to go back to work for the Company.

Callahan was reemployed by the Company on August 12. At that time, in lurid language, Marinelli expressed the opinion that Callahan had a lot of nerve returning to Respondent's employ and warned that with the first mistake on Callahan's part he would be discharged again.

On August 21 Marinelli asked Callahan how many men had attended a union meeting held the night before. Callahan refused to give Marinelli the desired information.[14]

I find that the Respondent violated Section 8(a)(3) of the Act by its discharge of Callahan on February 6. Colucci's question to Genareo on that day indicated that Respondent had information that Callahan had been compiling the list of names and addresses for the Union. Further, Marinelli in the discharge interview stated clearly that he knew of Callahan's involvement in the organizational campaign and the discharge was effectuated immediately upon Callahan's admission of his involvement. It was only after Callahan indicated that he would fight the discharge that Marinelli switched the grounds for termination to Clalahan's tardiness in reporting for work. Callahan admittedly had a record for lateness but this did not preclude the Company from rehiring him in May 1969 at a substantial raise in pay

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14. I find that Marinelli's question to Callahan not only constituted unlawful interrogation as to protected employee activity, but as well it created an impression of surveillance of protected activity.

or from granting him a wage increase in January 1970. It was only after Callahan took the lead in contacting the Union and openly assisting the Union that he was discharged on February 6 in the context of Respondent's unlawful reaction to the Union's mailing of campaign literature and authorization cards.

D. *Other Acts of Interference, Coercion, and Restraint*

As well as engaging in a campaign to induce its employees to turn into it the union authorization cards, the Company's reaction to the Union's organizing campaign led to other violations of the Act.

Thus, on February 6, Joseph Marinelli asked Constant Evanoski if he knew who had started the union campaign and who was behind the organizing effort.

During the afternoon of February 11 Walter Korab was approached by Joseph Marinelli, Colucci, and Marinelli, Sr. Joe Marinelli asked if Korab had anything to do with the Union. Korab replied that anything he did was his own business. Marinelli, Sr., agreed and the three left. Later that afternoon the three again came to Korab. Joe Marinelli said that Korab had been doing a wonderful job and that Colucci and Marinelli, Sr., agreed. Marinelli said that he had discharged Lengyel and Catterson because they were talking union[15] and he asked Korab to keep his nose clean because Marinelli had enough trouble and didn't want any more. After work on February 13 Colucci told Korab that he would hate to lose him because he was a good worker and advised Korab to keep his nose clean.

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15. Lengyel and Catterson were discharged during the morning of February 13.

William Summerville testified that on or about February 13 Marinelli, Sr., asked if Summerville had been to a union meeting and if he knew when the next one would be held. Marinelli, Sr., told Summerville to keep his nose clean and not to bother with the Union. That same day Joseph Marinelli and Colucci called Summerville aside and said that he had been to a union meeting the night before. When Summerville admitted that he had attended the session they told him to keep his nose clean and to stay away from union activity. Later that day Anthony Marinelli, Jr., came to Summerville with the same advice. At about 2:30 p.m. on February 13, Joseph Marinelli and Colucci again came to Summerville. Marinelli was excited. The company president said he was sick and tired of the union talk in the shop and that if he had to he would start at the top and fire the first 20 men. Marinelli said that if it came to it he would close the plant doors. During this conversation Colucci turned to employee Bucker and said, "You'd better get out of here, Eddie, and keep your nose clean or you'll be out the door."

James Burke was approached by Colucci and Joseph Marinelli on February 13 and asked if he had attended the union meeting the night before. When Burke denied that he had been there they said that he was lying and that they knew he was there. They told Burke that someone had told them that Burke had attended the meeting, who else had been there, and what had been said and done at the meeting. After Burke repeated that he had not attended a meeting the night before, Colucci asked about a meeting on the previous day. Burke admitted attending that meeting. Marinelli then said that he could start at the top and lay off 20 men because work was

slow. That same day, Michael Pietro, the purchasing agent, told Burke that he had heard that Burke had attended the union meeting, adding, "You know, if the Union gets in, we'd have to classify you as a laborer. A laborer gets $2.20 an hour."

Edward Bucker was told by Colucci and Joseph Marinelli on February 13 that if the Union came in they would cut back on the hours of work, make it rougher on the employees, and might even close the plant.

When Clair Catterson was returned to work on February 16 Joseph Marinelli asked if Catterson had signed a union card. When Catterson admitted that he had, Marinelli asked Catterson to bring the card in. Marinelli said that he knew what was going on with respect to union meetings. Marinelli added that he could not operate with a union and would shut the doors.

On February 16 Colucci told James Burke that if the Union came in Burke would be reclassified as a laborer at $2.45 per hour. That same day Joseph Marinelli repeated to Burke the statement that Marinelli could start at the top and lay off 20 men if he wished to do so.

On February 19 Colucci came to Burke in the parts room and told the employee that he knew where Burke was supposed to go that day and for his own sake Burke had better not go. When Burke asked what Colucci meant, the plant superintendent replied, "I know there's a meeting today, so you'd better not be down there."

During the evening of February 20 Marinelli called Summerville at his home and asked him to refrain from union activity and to stay on Marinelli's side. Summerville said that he would.

The foregoing recitation of events is based on the uncontroverted and credited testimony of the employees involved. By the foregoing acts I find that the Respondent created the impression of surveillance of the employees' union activities; threatened plant closure if the Union's organizing campaign succeeded; threatened the employees with loss of employment and reduction of wages if they selected the Union as their bargaining representative; interrogated employees concerning their own union activities and those of fellow employees; and asked that employees disavow the Union, all in violation of Section 8(a)(1) of the Act.

E. *The Discharge of Albert Lengyel*[16]

Lengyel was employed by Respondent as a welder from September 9, 1960, until his discharge on February 13, 1970. Over the course of his employment Lengyel received several wage increases, the last before his discharge, 10 cents per hour, coming in either December 1969 or January 1970.

A day or two after Lengyel first learned of the Union's organizing campaign during a conversation with Callahan, Callahan asked him to help gather names and addresses of employees for a union mailing. Lengyel secured about four or five mailing addresses and passed them on to Callahan.

During the afternoon of February 6 Lengyel, together with Mariano Simeone, Clair Catterson, and Donald Marcarella, was called to Michael Pietro's office,

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16. Unless otherwise noted the facts as to Lengyel's case are based on his largely unrebutted and credited testimony.

shown a union card and union literature, and asked if that material had been received in the mail. The assembled employees were told that some employees were trying to start a union and "he" didn't want it. The following day Plant Superintendent Colucci approached Lengyel at work and asked if he had received his card in the mail. Lengyel answered that he had not and Colucci walked on.

After a conversation with Harcar, Lengyel advised some of the employees that they could turn into the Company the authorization cards they had received in the mail and that they would be given replacement cards if they wished.

Lengyel signed a union card on February 9.

On or about February 11 Lengyel gave a number of authorization cards to employees Ed Bucker and Louis Napolitano. When Lengyel received some signed cards from Napolitano, he went to Callahan's home to turn in the cards. It was on this occasion that Lengyel met Harcar and Union Representative Muffler, and the union meeting held that evening in Harcar's office was arranged. Lengyel made a number of telephone calls to get men to that meeting.

The following day, February 12, Lengyel, together with employee Larry Marshall, was called to Joseph Marinelli's office. Joseph Marinelli told the employees that there was a lot of trouble in the shop and that they didn't want it. Marinelli spoke of company treatment of the employees and told the men that he had loaned Callahan $100 and that Callahan had then turned around and stabbed him in the back. Marinelli asked if they knew anything about a union meeting that night and

asked them to come in and let Respondent know if they heard anything in the shop. Before they left, Marinelli told Lengyel and Marshall that they were good workers and had not caused any trouble.

Shortly after 10 a.m. on February 13, Marinelli and Colucci came to the trailer where Lengyel and Catterson were working. Marinelli told Lengyel and Catterson that he was forced to let them go because of a slowdown in production, claiming that the yard was full of work. Catterson testified that there was plenty of work to do at that time. The two employees were told to leave at once and Colucci stayed with Catterson and Marinelli accompanied Lengyel until the men had left the plant, Lengyel and Catterson were the only employees terminated.

At about 11 p.m. on Sunday, February 15, Joseph Marinelli called Catterson at home. The company president said that he had been given false information, that he was sorry about "the whole circumstances," and that he would like Catterson to return to work. Catterson refused to return unless he received the $3 per hour he had been promised when first employed. Catterson got the $3. In this telephone conversation Marinelli said that he wanted no more union talk or activity and there was a verbal agreement between Marinelli and Catterson that the latter would refrain from such activity if he returned to work.[17]

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17. The foregoing account of the circumstances surrounding Catterson's reemployment on February 15 is based on Catterson's unrebutted and credited testimony.

Marinelli testified that he discharged Lengyel because Lengyel was roaming around from department to department on company time. Marinelli could not recall when it was that Colucci had told him about Lengyel's wandering through the plant or whether he had spoken to Lengyel about the matter before the discharge. Marinelli testified that he wasn't sure whether Lengyel had engaged in union activity. However, in his pretrial affidavit Marinelli stated that he laid off Lengyel and Catterson because he "had heard from some now forgotten employees that both these had talked union and passed cards on company time and also because business was slow. I was later told that Catterson had not been involved on company time and I called him back."

Keyman Patsy Circelli, called as a witness by Respondent, testified that Lengyel is in his department, that during the previous year no one in the department had spent a lot of time wandering around the factory rather than staying on the job, and that Lengyel did not spend more time wandering around the plant than did other employees.

Thus, Circelli, Respondent's witness, gives the lie to the Company's proffered reason for Lengyel's discharge. Undisturbed, however, is the fact that prior to his discharge Respondent was aware of Lengyel's union activity. "In the context of respondent's anti-union animus . . . the inference . . . of discriminatory motivation is sustained and is buttressed by the fact that the explanation of the layoffs failed to stand under scrutiny." *N.L.R.B.* v. *Griggs Equipment, Inc.*, 307 F.2d 275, 278 (C.A. 5); *N.L.R.B.* v. *Bird Machine Company*, 161 F.2d 589, 592 (C.A. 1). In the context of Respondent's antiunion campaign, its efforts to ascertain the identity

of the employees involved in the mailing of the Union's materials and the union meeting of February 11, Marinelli's acknowledgment of the Company's awareness of Lengyel's union activity, the reemployment of Catterson on February 15 when Respondent was disabused of "false information" and the deal that Catterson would refrain from union activity if he was returned to work, and the failure of Respondent's explanation for Lengyel's termination to stand up under scrutiny, I find that the Company violated Section 8(a)(3) and (1) of the Act by its discharge of Lengyel on February 13.

F. *The Events of June 22*

On June 19, following receipt of a number of authorization cards which he concluded had given the Union majority status, Harcar demanded recognition from the Company. This notice went by certified mail and the return receipt, dated June 20, was signed by Joseph Marinelli.

On June 22 Marinelli went from department to department asking the men if they had heard anything about the Union and union cards. Among those questioned were Clair Catterson and Tony Fundoots.[18] William Summerville testified that Marinelli came to him at about 11:30 a.m. and asked if Summerville had heard anything about the Union or if he had seen any cards being signed in the shop. Marinelli told Frank Genareo that he had cards in the office and that he wanted Genareo to sign one. Marinelli explained that these cards were for him and not for the Union. Genareo testified that Marinelli left him and spoke to other employees.

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18. Testimony of Catterson.

At lunch on June 22 a group of employees, including Walter Korab, Robert Jones, William Summerville, and Clair Catterson, discussed the situation in the shop. Korab was of the opinion that the men were acting like a bunch of kids and suggested that when they returned to work a group go in and talk to Joe Marinelli. Pursuant to Korab's suggestion the four men went to Marinelli's office following lunch. Jones acting as spokesman told Marinelli that a majority of the men had signed cards for the Union and told the company president that they wanted to discuss this with him.[19] Marinelli told the men to forget about the Union, that there would be no union in his shop, he would run the shop his way, and before a union came in he would close the plant doors.

Korab testified that the walkout June 22 came after he saw Marinelli walking through the shop following his meeting with the four employees. Korab told Summerville that he intended to walk out; the two clocked out and with about 20 other men who joined them walked to a parking lot across the street from the plant.

Marinelli came to the parking lot and as he was asking where their majority was another 25 to 30 men left the plant and joined the strikers. A discussion followed between Marinelli, who had been joined by Colucci, Korab and the other strikers. Marinelli suggested that he post some proposals on the bulletin board and that the men could vote on what they wanted. Among the matters that would be posted and which were discussed on the parking lot at this point were a pension

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19. Marinelli corraborated the account of this meeting in his office as testified to by Korab, Catterson, and Summerville.

plan, compulsory Saturday overtime, time and a half after 8 hours of work in a day, and wages. Catterson recalled that Marinelli said the men could get a committee or some kind of an organization. Korab stated that he didn't think things were being done right and that he thought the men should have someone there to represent them, suggesting that Harcar be called. Marinelli told Korab to forget about the Union.

While this general discussion was going on Harcar was called and he asked that the men go to a hall adjacent to the plant and that he would meet with them there.

Harcar met with the employees on the parking lot of the C & A Hall next to the company plant. Harcar read to the men the letter demanding recognition which he had mailed on June 19 and told the men that he did not think the walkout was the best course of action because Marinelli had not yet replied to the demand. Harcar advised the men to go back to work. Some employees said that they had all been fired, but Harcar told them to report to Marinelli that they were ready to go back to work.

Some men signed union authorization cards during the meeting on the C & A parking lot.

When the men arrived at the plant entrance they were met by Marinelli, his father, Colucci, two company salesmen, and the Hallowich brothers. Marinelli was telling the men to line up in two places depending on whether they were for him or the Union when Harcar interrupted. Harcar asked if Marinelli had received the Union's demand for recognition and whether he would agree to a card check. Marinelli replied that he would

not agree to a card check, that he felt like firing all the employees who had walked out, and that the men had no right to walk out. Harcar agreed that the walkout probably wouldn't solve anything but that the men should be returned to work. A discussion followed in which Marinelli restated his position on recognizing the Union, his intention to close the plant first, and his feeling that the plant had grown too large and that he could make more money with less men. Marinelli stated that those who had led the walkout were fired, naming Korab, Jones, Summerville, Catterson, and Genareo. After Harcar and Marinelli argued about the firing of these men Korab joined in saying that there was no use "standing out here and arguing like a bunch of jackasses." Korab asked that Marinelli either let the men go back to work and talk to their representatives or else send the men home. At that point Johnson, a company salesman, took Marinelli aside and after they had spoken Marinelli said that all the men could go back to work, that he needed time to think and would contact Harcar later. The men went into work and Harcar left at about 3:30 p.m. During the discussion between Harcar and Marinelli the men were standing around them in a semicircle.

After the men were back in the shop Colucci called them to the lower end of the shop, saying that Joe Marinelli wanted to talk to them.[20] Instead of Marinelli, Salesman Johnson addressed the employees. Johnson told the employees of his many years of experience with unions. He told the men that the Company was the only place in town that permitted its employees to

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20. Curtis Crill was told to go to this meeting by Ed Hallowich.

work as many hours as they wished and that if the Union came in Marinelli might have to lay off men or cut the hours. Johnson pointed out that many of the men were in debt with bills to pay and that if the Union came in and there was a strike they could lose everything they had worked so hard to get. Curtis Grill testified that after Johnson spoke Marinelli told the employees to get three men to represent them on a Grievance Committee and that they could have a vote the next day.

At about 4 p.m. on June 22 Catterson heard that there would be a vote before the men went home that day and that they were not to clock out.

Some 40 minutes after he had left City Welding Harcar received a call from Joe Marinelli. The company president said that he wanted an election at quitting time and asked Harcar to come out to the plant. Harcar agreed to come to the plant but did not go along with the idea of an election then. When Harcar arrived at the plant he found the employees lined up at the door. Marinelli told Harcar that the men were all ready to vote. Harcar said he wanted to discuss the matter with Marinelli. The two went to Marinelli's office where they were joined by Colucci and Marinelli, Sr. Harcar again asked Marinelli to agree to a card check, adding that if the Union had a majority they could probably reach an agreement without a work stoppage. At Marinelli's request Harcar read to him the Union's model recognition agreement form. Marinelli insisted on an election but Harcar demurred, asking at this point who Marinelli intended to vote in such an election. Marinelli replied " all of the employees" agreeing to exclude the office workers but insisting that Colucci was the only

supervisor in the plant and that the keymen were eligible to vote. Marinelli explained that the men would vote by signing one of two pieces of paper. One of the sheets would be headed by Marinelli's name, the other by Harcar's. Harcar replied that this was not a secret ballot and that he could not agree to any vote on those terms.

At this point Ed Hallowich came in and said that the employees wanted to go home if they were not going to vote. Marinelli told Hallowich to tell the employees that there would be no vote that day. Harcar asked to speak to the employees before they left.

Harcar told the employees that there was not going to be an election that day and that if there ever was to be an election in the plant it would be conducted by the NLRB wih prior notice to the employees, a secret ballot in a closed voting booth, and that Harcar would not be permitted on the premises during the balloting. The union agent advised the men to go home and to report for work at their regular time the next morning.

During the evening of June 22 Harcar received calls from Korab, Catterson, Summerville, and Jones advising him that they had been discharged by Marinelli for agitating a strike and instigating a walkout at the plant.

Korab testified that Marinelli called him at about 10.45 p.m. and said that he would have to let Korab go. When Korab asked why, Marinelli replied, "Walt, you know you're one of the instigators that caused this wildcat strike — this walkout and I'm afraid I'm going to have to let you go."

Catterson was called at about the same time and when he asked why he was being fired Marinelli replied

that it was for instigating a walkout. Summerville was told by Marinelli that he was fired for instigating a wildcat strike and for wanting to organize a union at City Welding.

Harcar called Marinelli at about midnight and asked him to reconsider his discharge of the four employees. Harcar pointed out that all the employees had participated in the walkout and that the discharges would only lead to more disruption. Marinelli insisted that he had chosen the course of action he wished to follow, that he would reconsider based on Harcar's request but that he thought the actions would stand.

At the hearing the Company admitted that the employees were discharged because they engaged in a work stoppage or strike. The cases are legion that participation in a work stoppage or strike is a protected concerted activity and that discharge for such action is a violation of the Act.[21] The walkout on June 22 came about, in Curtis Crill's words, because he "thought by doing so, we could get recognition for a card check for the Union." The discharge of Korab, Summerville, Catterson, and Jones on June 22 because they instigated and participated in the strike violated Section 8(a)(3) and (1) of the Act.[22]

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21. See Sec. 13 of the Act.

22. See *Hartford Faience Company,* 183 NLRB No. 42.

G. *The Events of June 23*

Following the call from Marinelli advising him that he had been discharged, William Summerville called Randy Rubeis and asked that Rubeis not go into work the next morning until the four discharged employees were also permitted to work. Rubeis agreed to do so.

The next morning, June 23, the four dischargees, joined by a number of other employees, picketed the plant with homemade signs. Among the slogans on the placards were: "City Welding will not recognize the Union" and "Let's all be brothers and join the Union." After a time all but eight men, the four dischargees and Randy Rubeis, Joe Todd, Donald Macarella, and Frank Genareo, went into work in the plant. Paul Harcar was there at Catterson's request to be a witness when Catterson asked Marinelli to repeat the reasons for the terminations.

Catterson and Harcar spoke to Marinelli and asked him to repeat what he had said on the telephone the night before. Marinelli stated, "I told you that you were being fired for agitating and instigating a walkout at the plant yesterday." Catterson denied having been one of the leaders in the walkout although he had joined the demonstration. Marinelli replied, "I knew you guys was going to make a mistake and that's what I was waiting on. You made your mistake when you walked out that door." Marinelli then pointed across the street and said that the men there were fired.

Marinelli testified that six or eight of the men stood out in the street and he replaced them with other men in the shop.

As with the four employees discharged on June 22, at the hearing the Company admitted that on June 23 it had discharged Frank Genareo, Joseph Todd, Randy Rubeis, and Donald Macarella "because they engaged in a work stoppage or strike." As with the Respondent's actions on June 22, I find that the termination of the four named employees on June 23 was in violation of Section 8(a)(3) and (1) of the Act.

H. *The Employees Grievance Committee*

The first suggestion for an employee committee came from Joe Marinelli on June 22 during the walkout when he spoke to the men and suggested that he could post some proposals concerning their demands and that the employees could vote on those matters.[23]

At the meeting of the employees in the plant called by Respondent following the return to work from the walkout, Marinelli told the employees that they should form a Grievance Committee by splitting the shop into three sections. Marinelli said there would be a vote the next day.[24]

On June 23 Plant Superintendent Colucci went through the factory arranging for the election of committeemen which was held during the 2:30 p.m. break. In his rounds Colucci came to the fabrication depart-

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23. Based on the credited testimony of Clair Catterson and Raymond Attisano. Larry Marshall testified that employee Tony Angelo brought up the idea of a grievance committee. I do not credit Marshall. Further, Angelo testified but did not claim to have fathered the idea.

24. Testimony of Attisano and Curtis Crill.

ment and said that three grievance men would be selected by a vote that day in the three sections into which the shop had been divided.

Colucci came to the parts room and told James Burke there would be a vote to select a three-man Grievance Committee. Burke was told to go to the flatbed department at his 2:30 p.m. break to vote.

In the flatbed department the voting was conducted by Ed Hallowich who handed each man a blank piece of paper on which to write his choice for committee member. Hallowich did not vote after announcing that foremen were ineligible to cast ballots. Hallowich collected and counted the completed ballots.

Colucci announced the winners: Constant Evanoski, Tim Burns, and Larry Marshall. James Burke testified that after the voting he observed David Hallowich, keyman in the service department, post a notice on the bulletin board signed by the three committeemen to the effect that they would be holding a meeting.

Folowing the election Evanoski met with Joe Marinelli and asked what Marinelli wanted the Employees Grievance Committee to do. Marinelli said that they would get together and later that day the three committeemen met with Marinelli for a discussion on how the Committee was to function.

Thereafter, the Committee met with Marinelli at least five times and negotiated wage rates for the employees. As well, Marinelli and the Committee discussed such other matters as a pension plan, overtime, and vacations.

Evanoski testified that there was no document prepared describing the Committee although the committeemen defined its purpose to the men in the plant.

The Committee collected no dues and had no expenses.

As to employee membership in the Committee the following exchange took place while Evanoski was testifying:

Q. Are there any employees who are members of this Committee?

A. Yes.

Q. Are all the employees members of this Committee?

A. Yes, they're all for it.

Q. When a new employee is employed at City Welding, how does he obtain membership in this Grievance Committee?

A. He would be automatically — I don't know. — automatically, you know, member.

Although the Committee discussed vacations, pensions, overtime pay, and compulsory Saturday overtime, as well as wages with Marinelli, there is no evidence that there was agreement on any issue other than wages. There is no evidence that a collective-bargaining agreement was ever consummated between the Committee and Respondent.

Larry Marshall testified that the Committee decided to stop holding meetings when the trial in this case came up.

In a case[25] where the facts were strikingly similar to those in this proceeding the Board held:

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25. *Tuscarora Plastics Co.*, 167 NLRB 1059, 1060.

> Where, as here, the Respondent-initiated Committee had no discernible resources, collected no dues, had no constitution or bylaws, had not consummated a collective-bargaining contract, and structurally was under Respondent's implicit power to control its composition and to some extent control the conduct of its meetings, we find the conclusion inescapable that Respondent dominated the Committee.[5]

Respondent conceded that it "promoted" the Committee but denied that it initiated or dominated the employee representative agent. It is the very fact of Respondent's initiation, promotion, and domination of the Committee which removes this case from the ambit of that line of cases holding that an employer's recognition of one of two competing labor organizations is a violation of Section 8(a)(2) of the Act. Here, there was one labor organization, the Union, seeking to represent the employees. In the face of that demand the Respondent initiated the idea of, promoted the organization of, and solely determined the structure and composition of the Committee. What the Respondent has done is to make "it mandatory, and in effect a condition of employment, that any collective bargaining that there might be must follow certain procedures, with Respondent deciding who should be the spokesmen for the employees. . . . . *Walton Manufacturing Company,* 126 NLRB 697, 700, enfd. 289 F.2d 177 (C.A. 5)." . . . Respondent violated [the Act] by imposing a committee of its own creation upon employees as their collective-bargaining representative for any collective bargaining

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5. *K & M Machine Company,* 162 NLRB 83; see also *Hydraulic Accessories Company,* 165 NLRB 864.

which they might wish to engage in, and thereby interfering with their rights to self-organization and to bargain through representatives of their own choosing." *Walton Manufacturing, supra,* 701. [26].

I. *The Demands for Recognition*

On June 19, by certified mail, return receipt request, Harcar sent the following request for recognition to Respondent:

> This is to advise you that District 106 of the International Association of Machinists and Aerospace Workers, AFL-CIO, represents a majority of your employees in a bargaining unit consisting of all production and maintenance employees, exclud-

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26. During the walkout on June 22 Martinelli offered to post proposals about various items of employment conditions, including wages. After the Company promoted and initiated the Committee it was Martinelli who determined the agenda for negotiations. That wages were high on his agenda is evidenced by the short time between formation of the Committee on June 23 and payment of the wage increase on July 2. During that period Marinelli asked what the Committee thought the men wanted; wages of competitive employers were investigated and Marinelli agreed to the wage increase. Under these circumstances it can be inferred that Respondent "was motivated by a desire to chill the employees' interest in union representation, and it is so found. But even assuming that such was not Respondent's motivation, the circumstances under which the . . . wage increases were given reasonably tended to interfere with, restrain, and coerce employees in the exercise of their right to be represented by the Union, and therefore, the Respondent thereby engaged in further violation of Section 8(a)(1) of the Act. [Footnote omitted.]" *K & M Machine Company, Inc.*, 162 NLRB 83, 92.

ing office clerical and professional employees, watchmen, guards and all supervisors as defined in the National Labor Relations Act as amended. You are to consider this a continuing request for employees included in the unit described.

You are further advised that we are prepared to furnish proof to you, through some mutually agreed on impartial third party such as a member of the State or Federal Mediation Service, a Minister, Rabbi, Priest, that we actually do, in fact, represent a majority of the employees referred to above.

In view of this we are herewith requesting recognition and collective bargaining rights on behalf of the employees as the sole and exclusive collective bargaining agency in all matters pertaining to wages, rates of pay, hours of work and all other conditions of employment.

The Union is prepared to meet with you at your convenience to discuss these matters and to negotiate a collective bargaining agreement. You may contact the writer at the address listed above or by telephoning 658-8611 or 654-1334.

The return receipt for this letter is dated June 22 and signed by Joseph Marinelli.

Twice on June 22 Harcar orally requested Marinelli to afford recognition to the Union. The first demand came after the men had offered to return to work but before Marinelli had agreed that they could do so. At that time Harcar asked Marinelli if he had received the Union's demand for recognition and whether he would agree to a card check. Marinelli refused

to submit to a card check, restated his position on recognizing the Union, that he would close the plant first and that he could make more money with fewer employees.

Later that same day, after Marinelli had asked Harcar to return to City Welding so that an election could be conducted, Harcar repeated his request that the Company go to a card check. At Marinelli's request Harcar read the Union's model recognition agreement form. Marinelli insisted on an election and they then discussed which employees would be eligible to vote. Marinelli agreed to exclude office workers but he and Harcar disagreed on the number and identity of the plant supervisors.

I find that the Union's letter of June 19 and Harcar's oral requests on June 22 constituted valid demands on the Company for recognition and bargaining. *Barney's Supercenter, Inc.*, 128 NLRB 1325, enfd. F.2d 91 (C.A. 3).

J. The Union's Majority

At the hearing the General Counsel introduced into evidence 36 cards signed by employees authorizing the Union to represent them. The Card read as follows:

> YES, I WANT THE IAM
>
> I, the undersigned employee of
> (Company) authorize the International Association of Machinists and Aerospace Workers (IAM) to act as my collective bargaining agent for wages, hours and working conditions. I agree that this card may be used either to support a demand for recognition or an NLRB election, at the discretion of the union.

The Supreme Court in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 606-607, resolved the then-existing conflict among the circuits in favor of approving the Board's *Cumberland* rule [27] as to the validity of authorization cards. As set forth by the Court in *Gissel Packing* [28] the *Cumberland* rule provides as follows:

> [I]f the card itself is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election. [Emphasis in original.]

The Union's card meets the test of unambiguity stating on its face that the signer authorizes the IAM to act as his collective-bargaining agent for wages, hours, and working conditions.[29]

As to certain of the cards offered in evidence to support the Union's majority there was testimony offered, in most cases by the employee who had signed the card, as to statements made before or at the time the card was signed which might, if credited, vitiate

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27. *Cumberland Shoe Corp.*, 144 NLRB 1268.

28. 395 U. S. 575, 584.

29. Although the cards in this proceeding provided the signer agreed that the "card may be used either to support a demand for recognition or an NLRB election, at the discretion of the union," there is no problem presented of a dual-purpose card. Following the Court's holding in *Gissel Packing* at page 606, I find that these were "single-purpose cards, stating clearly and unambiguously on their face that the signer designated the union as his representative."

the value of the authorization. There were a number of employees who sought to establish that their signatures were obtained by the solicitors' statements that the cards would be used to obtain an election and/or that the Union had already achieved a majority. In most instances, as more fully explored below, after these witnesses had fully testified it became apparent that these facts surrounding the execution of their authorizations did not match the eager assertion that the magic words "election" and "majority" had been used to secure their signatures. In part I attribute the confused state of this testimony to an honest ignorance on the part of some of the witnesses as to the differences in fact between an election and a card check. However, as to most of the testimony of this nature, I am constrained to conclude that the explanation is to be found in the Court's observation "that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened [and carried out] reprisals for union activity in violation of [the Act]" *N.L.R.B. v. Gissel Packing Co.*, 395 U. S. 575, 608.

Of the 36 cards received in evidence, 16 in number are unaffected by any testimony affecting their validity as unambiguous authorization for the Union to represent the employees signing those cards. These cards were signed by:

Raymond M. Attisano	Albert Lengyel
Edward J. Bucker	Donald F. Marcarella
James Burke	Jerry Maggie
Edward Callahan	Jerry Passerrello
Clair M. Catterson	Randall R. Rubeis
Curtis Crill	Mariano Simeone
Frank J. Genareo	William L. Summerville
Walter Korab	Stanley Walczak

On a chart listing the names of employees who signed union cards,[30] I have indicated the date on which the cards were signed and whether each card operated as a valid designation of the Union on the 2 days on which demands were made, June 19 by certified mail and June 22 in Harcar's conversations with Joe Marinelli.

As to the remaining 20 cards there was testimony which must be evaluated before determining whether those cards may go to establish the Union's majority.

CONSTANT EVANOSKI, III, ALBERT E. RENO, DONALD HABEN, AND JOSEPH J. TUSCANO

Haben signed his union card on June 18. Evanoski, Reno, and Tuscano executed their union authorizations on June 19. At or about the time each was asked to sign for the Union he was told that the Union had already achieved majority status among the employees. Thus, Haben and Reno were told by Walter Korab that 60 percent or more of the employees had already signed. Evanoski was told that a good percentage, more than half the people, had already signed up. Korab told Tuscano that he was trying to get the Union in and a majority of the men had signed.

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30. Appendix B.

There is no evidence "that [the] employees . . . did not want the Union when they signed their cards, or that they were *tricked* into signing because they thought the Union already was the exclusive representative even without their cards." [Emphasis in text.] *Marie Phillips, Inc.*, 178 NLRB No. 53, enfd. F.2d , 75 LRRM 2539 (C.A.D.C.). None of the four employees in any way indicated that he had signed the card in reliance on the representation that a majority had already been secured. Thus, I find that there is no evidence that these union authorizations were obtained as a result of misrepresentation and conclude that they are valid authorizations.

Anthony Angelo

Angelo, employed by Respondent for some 2½ years and one of the most senior men in the flatbed department, signed a union card on June 18. He received the card from Anthony Fundoots. Angelo, now a member of the Employees Grievance Committee, who, in his own words, does "most of the talking" and in August was the spokesman when a group of employees brought a petition to the Board's Regional Office seeking an election, touched all bases in an effort to repudiate his card. Angelo testified that he had been told that a majority of the men had already signed and he was one of the last unsigned; that he was fearful of what would happen if the men found out that he had not signed a card; that he thought the card was for an election; that he had not read the card before signing and indeed had told Fundoots that he did not want to read it; and, that he signed because he was fearful of violence because there had been slashing of tires and car seats.

It developed that the statements concerning majority were allegedly made to Angelo by Summerville earlier in the day. As to the violence and tire and seat slashing, the testimony of David Duddy established that this had taken place in December 1969 and was unconnected with the Union's organizing campaign.[31] However, Angelo's statement that he had announced to Fundoots when he signed the card that he was doing so because of the violence stands unrebutted on the record. On the other hand, I "also note that [Angelo's] testimony was uncorroborated and was adduced after Respondent had engaged in unlawful conduct which had the inherent tendency of causing employees to believe, after having signed the cards, that their interests would be best served by renouncing the Union and reestablishing themselves in Respondent's good graces." *Marie Phillips, Inc.*, 178 NLRB No. 53, footnote 6, enfd. F.2d , 75 LRRM 2539 (C.A.D.C.). In Angelo's case his testimony stands undisturbed, either by rebutting witnesses or, as was true in the case of a number of employees, by inconsistencies in his own account of the event. Accordingly, I shall not count Angelo's card in determining the Union's majority status.

ANTHONY ANTUONO

Antuono testified that he received a card from Summerville and after filling in and signing the authorization he returned it to Summerville on June 18.

Antuono first testified that he had been told by Summerville that a majority of the men had signed. This

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31. Joe Marinelli had attempted to connect the discharge of Callahan with the same incidents referred to by Angelo.

statement was allegedly made before the card was signed but not at the time Summerville gave the card to Antuono. Thereafter, Antuono attributed to Summerville the following statement, "The majority of the guys, you know, we have most of the majority except for about, you know, five or six." Later Antuono testified that Summerville had said that if Antuono and a few others would sign that they will have a majority. Finally, Antuono was asked:

Q. But did he tell you that he already had a majority?

A. No, he didn't say that. If they already had it, why would they want me to sign if they already had it.

I find that Antuono's unambiguous authorization of the Union to act as his bargaining agent is untainted by any misrepresentation.

TIMOTHY BURNS

Paul Harcar credibly testified that he solicited a card from Burns on February 16 at the employee's home. Harcar stated that he told Burns the card could be used in two ways, either to support a demand for recognition or for a Board-conducted election.

When shown his union card at the hearing Burns testified "That's the cards we signed for the election, for the Union." Burns testified that Harcar had said the Union needed 30 percent of the cards for an election and that they were only a few cards short of the required amount. Burns testified that before he signed the card Harcar had told him that he wanted to get people signed up for an election.

Harcar denied using the figure of 30 percent in the conversation, claiming that in reference to an election petition he used the figure 60 percent because he had written instructions from the Union that a petition could not be filed unless supported by a 60 percent showing of interest. Those written instructions were produced at the hearing.

Throughout his several appearances on the stand I found Harcar to be a credible witness who was corroborated in most major respects by equally credible witnesses. I credit his testimony as to his conversations with Burns on February 16 when he solicited a union card from the employee and find that Burns was not induced to sign the card by assurances that it would be used to support a petition for an election. I find that Burns' card is a valid unambiguous designation of the Union to be his bargaining agent.[32]

STEVE DEGENNARO

At the time of his appearance as a witness in this proceeding DeGennaro had been in the United States 15½ months and employed by Respondent for 15 months. DeGennaro, a native of Italy, testified with the assistance of an interpreter.

DeGennaro's card is dated June 22, the day of the walkout. DeGennaro testified that he walked out with everyone else and signed the card because he was asked

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32. In evaluating Burns' testimony I note that he testified to a conversation between Glenn Tanner and Summerville on June 22 whereas Tanner made no reference to the alleged discussion during his appearance as a witness.

to do so. DeGennaro testified that he did not read the card, does not know what a union is, and did not belong to a union in Italy. There is no evidence that DeGennaro was aware of what he was doing when he signed the card, no evidence that he was capable of reading the card, no evidence that anyone explained the card to him before he signed it, and I find therefore that the card does not constitute a valid designation of the Union to act as his bargaining agent.

JAMES V. DEROSA

DeRosa signed his card for the Union at the meeting at Harcar's office on February 11. DeRosa first testified that someone at the meeting had asked what the card signing was leading to and that Harcar replied, "It's going to lead to an election."

Subsequently DeRosa was asked the following questions and he replied:

Q. Mr. DeRosa, do you recall any conversation about a rabbi or a priest at that meeting?

A. Right; there was.

Q. You do?

A. Right.

Q. Do you recall what was said about a rabbi or a priest?

A. After that there question, what does it lead to, they said — Paul said — Mr. Harcar said we'd have this here card signing verified by a priest or mayor or Your Honor, you know, someone that can be trusted to prove that these here cards were signed. That was said; Paul did say that.

I find that DeRosa should be numbered among those who were confused as to the meaning of an election or a card check, but that in any event he was not induced to sign his designation of the Union to be his bargaining agent by any misrepresentation as to the use the Union would make of the card.

DAVID DUDDY

Duddy filled out and signed his union card on February 20 at Walter Korab's home.

Duddy testified on cross-examination that he had not read the card before signing it and that Korab had said the card was for an election. Respondent's counsel then led Duddy through a line of questioning in which Duddy testified that he had received a telephone call threatening that he would have his "head kicked in" if he did not sign a union card and that the seats in his car had been cut before he signed the card. Duddy further testified that employees Albert Reno's and Burns' tires had been slashed. It subsequently developed that these incidents had taken place around Christmas time 1969, over a month before the Union's organizing campaign began and at a time when unrelated employee petitions were being circulated in the plant. As to the telephone call, Duddy did not know who had made it. From my observation of Duddy while testifying and the confused state of his testimony, I do not credit his assertion that he had not read the card before signing and for an election. Rather. I conclude that as stated on the face of the card Duddy was unambiguously designating the Union to be his bargaining representative and I shall include his card in computation of the Union's majority status.

HAROLD R. FORKEY, JR.

Harold Forkey signed a union card on June 18. Korab told Forkey that the card would be used for "a card check." At the time he signed the card Summerville and Korab told Forkey "that all they needed was ten more guys and they would have it."

Harold Forkey's card is a valid designation of the Union to be his collective-bargaining agent.

RAYMOND L. FORKEY

Raymond Forkey signed a union card on June 18 at William Summerville's behest. Forkey testified that Summerville told him he needed one more card and asked Forkey to sign it. The questions and answers were as follows:

Q. [By Respondent's counsel] Did Mr. Summerville say anything to you about the majority of the people already having signed it?
A. [Ray Forkey] Yes.
Q. What did he say?
A. He told me that he needed one more card signed.
Q. He needed one more card signed?
A. One more card signed.
Q. But not one more card signed for what purpose?
A. He didn't explain.

The only indication in the record that Summerville mentioned the word "majority" to Ray Forkey was in counsel's leading question. I find that Ray Forkey's card is a valid designation of the Union to be his collective-bargaining agent.

ANTHONY FUNDOOTS

Paul Harcar testified that on June 17, together with Edward Callahan, he went to Fundoots' home to solicit for the Union. Harcar asked Fundoots if he would be interested in signing a card. Fundoots turned on the porch light so that he could read the card. Harcar testified that he explained that the card could be used to support a demand for recognition or for an election. Harcar explained that a card check would be conducted by a rabbi, priest, or Federal or state mediator who, as an impartial third party, would check the cards to see if the Union had a majority. Harcar told Fundoots that when the Union had a majority among the employees they would write a letter to Martinelli requesting recognition.

Anthony Angelo testified that he received the union card which he signed from Fundoots on June 18 and after signing the card he returned it to Fundoots.

Later on June 18 Fundoots accompanied Summerville and Jones to Harcar's office at which time Summerville delivered a number of signed authorization cards to the union agent. At that time Harcar said that with the cards then delivered the Union had a majority and he would send a letter demanding recognition.

Fundoots touched all the bases in seeking to repudiate his card.[33] Fundoots maintained that Harcar said he had a majority of the cards signed, that they

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33. Asked at the hearing to identify his card, Fundoots replied, "It's a crummy card; that's what it is."

were for an election, and that he had signed at his wife's request because "she was scared. She had experienced stuff like this before. So I signed the card; that was it."

As Fundoots testified it developed that Harcar had told him there "would be a priest or rabbi there in case anybody questioned how many cards they had for an election, to verify." Fundoots thus corroborated Harcar's testimony that he had spoken to Fundoots about a card check and had explained the procedure to him. On the subject of a "majority," as Fundoots remained on the witness stand, he explained that Harcar had said he had "almost a majority." At a later point Fundoots admitted that Harcar had "said he needed a couple of cards for the majority." Finally, as to his wife's fears, Fundoots explained that he had been telling her about men getting their tires slashed and seats cut. These incidents had occurred in December 1969. Fundoots' card is dated June 18. Fundoots' claim that he signed the card on June 18 to calm his wife's fear of violence if he did not do so is belied by his solicitation of Angelo for the Union on June 19 and his visit to the union office that day with Summerville and Jones to deliver additional signed authorization cards. I do not credit Fundoots' testimony. I credit Harcar's version of the events surrounding Fundoots' signing a union card and find that his card is a valid designation of the Union to serve as his bargaining agent.

ROBERT R. JONES

Jones signed his union card on June 18. He could not recall who had given him the card because at the time he and a group of some eight men were in a cafe drinking and eating lunch and cards were changing hands at the table. There was a discussion at the table about the fact that a majority of the employees had already signed cards and someone said, "We have over half, now."

Jones was one of the four men who went to Marinelli on June 22, advised him that the Union represented a majority of the employees, and asked for discussions. Subsequently, Jones was among those unlawfully discharged for instigating a walkout. This postsigning conduct buttresses a finding that Jones wanted the Union when he signed the card and was not induced to sign by misrepresentation.

LARRY D. MARSHALL

Marshall signed his union card on February 6. Marshall testified that he had received the card from either Callahan or DeRosa and that there were a lot of people passing out cards at the time. When he was given the card, Marshall testified, the solicitor "said he talked to somebody about — the Union representative about getting the Union in and the Union was going to give him some cards to come down and have the men sign. And if a majority of the men sign the cards, he said we can have an election to vote the Union in there." Marshall testified that he held the card for a time and then gave it to either Callahan or DeRosa. Harcar's coding symbol on Marshall's card indicates that the Union received the signed card in the mail.

Callahan denied giving a card to Marshall, stating that prior to his discharge the only employee to whom he gave a card was Lengyel. Further, the only employees in the shop with cards were Lengyel and Callahan. Callahan testified that a day or two after his discharge on February 6 he went to Marshall's home and asked if he had signed a card. Marshall replied that he had signed the card he had received in the mail and had returned it. Marshall's name appears on the mailing list Callahan had prepared and given to Harcar.

I do not credit Marshall, one of the three committeemen of the Employees Grievance Committee. There is no evidence to support his statement that there were a lot of cards floating around the shop on February 6. Rather, that was the day that the Union's mailing was received and Respondent launched its campaign to have the employees turn in the cards they received in the mail. Accordingly, I find that Marshall's card is a valid authorization for the Union to be his collective-bargaining agent according to the unambiguous terms of the card.

Napolitano had been in the United States 16 months at the time of the hearing herein and has been employed by Respondent for approximately the same length of time. Napolitano signed the card introduced into evidence on March 6 in Harcar's office.[34] Napolitano had signed a card in February which had been turned in to the Union.

On February 23 Frank DuBois, a foreman and nephew of Joe Marinelli, came to the union office with

34. Napolitano testified with the aid of an interpreter.

Napolitano and Michele Schettino, another Italian-speaking employee. DuBois told Harcar that he had been told by Marinelli to bring the two employees to the union office o have their union cards returned to them.

On February 24 Joe Marinelli himself came to the union office with Napolitano and Schettino. Marinelli said he was there to see that the employees got their cards back. On that occasion there was an Italian-speaking member of the Union present but he could not speak the particular dialect which the two Italian workers spoke, so Harcar asked them to return at a time when he could question them with no company representative present.

LOUIS NAPOLITANO

Napolitano returned to Harcar's office on March 6 but Schettino did not accompany him. Present at the Union office was Andrew DiLorenzo, an Italian-speaking member of the Union. On this occasion Napolitano asked for his own and Schettino's cards. Napolitano's first card was returned to him and he destroyed it. Napolitano first testified that he signed the second card because he was afraid that if he did not do so he would not get his first card back. Thereafter, Napolitano testified that he signed the second card after he had been given his first card and he had destroyed it. As to the card itself Napolitano testified that he understood the card entitled him to belong to the Union but that he was not told what the Union would do with the card. Asked about what DiLorenzo had said to him, Napolitano stated that DiLorenzo had not used the word election nor had he mentioned a priest, minister or rabbi.

DiLorenzo testified that Napolitano said he wanted the cards so that he could show them to his boss and then tear them up. DiLorenzo translated the card for Napolitano and to the best of his ability explained what the card and his signature thereon meant. DiLorenzo explained that it was up to the Union as to whether to exercise the option to have an NLRB election. However, DiLorenzo testified:

> . . . he didn't seem to quite grasp the mechanics of it, because he said he would sign the card. This was his intention; he was interested in signing the card, because he seemed to understand that it would mean a kind of general improvement in the whole area there where he works.
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> • • • • • • •
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> . . . there was talk about an election on the part of Mr. Napolitano. . . . he seemed to think — and I think this is a general consensus; at least, he reflected this — that there had to be an election. He didn't quite grasp the fact that the signing of the card was the authorization for representation.

On the state of the record I cannot find that Napolitano's card is a valid designation of the Union to be his collective-bargaining agent. I am aware that in part I have taken evidence of Napolitano's subjective intent into consideration in reaching this conclusion. However, in view of the fact that he could not read the card and that DiLorenzo who read it to him and explained its meaning testified that Napolitano "didn't quite grasp the fact that the signing of the card was the authorization for representation," I am constrained to reject Napolitano's card.

MICHELE SCHETTINO

Schettino had been in the United States for 15½ months and has worked for the Company 15 months. He testified in this proceeding through an interpreter. His union card in evidence is dated June 22. Schettino signed the card but all other material on the card was filled in by some unidentified person.

Schettino testified that on June 22 he walked out with the other employees. At that time his friends were signing cards so he signed one. He knew it was a union card but no more than that. He cannot read the English language card and no one translated it for him.

As with Napolitano there is no evidence (indeed the record indicates to the contrary) that Schettino knew he was authorizing the Union to represent him when he signed the card. Accordingly, I reject Schettino's card as a valid designation of the Union as his bargaining representative.

GLENN TANNER

Tanner filled out and signed his union card on June 22 during the walkout that day. Tanner recalled that the card was signed before Harcar arrived and spoke to the employees. Summerville gave the card to Tanner, who, without any discusison with Summerville, read the card and signed and returned it to Summerville.

I find that Tanner's card is a valid designation of the Union to be his bargaining agent and should be counted in computing the Union's majority on June 22

when Harcar orally reiterated the Union's demand for recognition.[35]

JOSEPH P. TODD

On June 18 Todd asked Bobby Jones for a union card which he signed and returned to Jones. Todd had no conversation with Jones about the card. Under examination by Respondent's counsel Todd testified as follows:

Q. Did you have any discussion about the fact that a majority of the guys had already signed?

A. Yes.

Q. What was that discussion?

A. Well, I heard Bill Summerville tell, when I worked down in the chassis department, that he said—

* * * * * * *

A. He told me that all the guys had signed the cards—most of the guys.

* * * * * * *

A. Well, we was just talking and he said that most of the guys had signed the cards. He said they just needed a few more guys to sign the cards.

I find that Todd's card is a valid designation of the Union as his bargaining representative and was not induced by any misrepresentation that a majority of the

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35. I have heretofore noted and discredited Timothy Burns' claim that in a conversation on June 22 Summerville attempted to prevent Tanner from attending the meeting at the C & A Hall during the walkout because Tanner had not signed a union card. Tanner did not mention such a conversation with Summerville and as set forth above stated that he had no conversation with Summerville.

employees had already signed cards. The only reference to a majority in Todd's testimony was in the leading question put to him by Respondent's counsel.

JOHN WIDELKO

Widelko's union card is dated February 6 and was turned in to Harcar at the meeting in the union office on February 11. After first testifying that he had been told that the solicitation of the cards would lead to an election, Widelko stated that at the meeting Harcar said that if there was a high percentage of cards signed the Union would come in without an election. However, Widelko could not recall that Harcar had said anything about a card check at the meeting on February 11. I have heretofore found that Harcar did explain the mechanics of a card check at that meeting and that Widelko was present. I find that Widelko's recollection is faulty, that he was not induced to sign and turn in his authorization card on the representation that it was for an election only, and that his card is a valid authorization for the Union to be his bargaining representative.

CONCLUSIONS

I heretofore found that at the time of the Union's demands for recognition, which came on June 19 and 22, there were 53 employees in the bargaining unit. Based upon the analysis above, I find that on June 19 the Union possessed valid authorization cards from 30 employees in the unit and that on June 22 the number of valid authorizations had increased to 32. Thus, on both critical dates the Union represented a majority of employees in the unit.

K. The Refusal To Bargain

I find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as requested and that the only appropriate remedy is an order to bargain with the Union. Moreover, Respondent's unfair labor practices were so flagrant and coercive in nature as to require, even in the absence of an 8(a)(5) violation, a bargaining order to repair their effect.

The Supreme Court, in *N.L.R.B. v. Gissel Packing Company*, 395 U.S. 575, 615, in setting forth general principles applicable to the issuance of bargaining orders, held that the Board has authority to issue such orders to remedy unfair labor practices "so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those [unfair labor practices]." Earlier in *Gissel Packing*[36] the Court had approved the Board's authority to issue a bargaining order ". . . in less extraordinary cases marked by less pervasive practices which nevertheless still have the tendency to undermine majority strength and impede the election processes." In such a case the Board must examine the nature and extent of the employer's unlawful conduct and determine the likelihood that the use of traditional remedies would ensure a fair election. The Court instructed the Board to decide whether ". . . even though traditional remedies might be able to ensure a fair election, there was insufficient indication that an election . . . would definitely be a more reliable test of the employees'

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36. 395 U.S. 575, 614.

desires than the card count taken before the unfair labor practices occurred."[37] *Medley Distilling Company, Inc.*, 187 NLRB No. 12.

Following the Union's demand for recognition received June 20, on June 22 Marinelli went through the plant asking the employees if they had heard anything about the Union and union cards. When a delegation of employees met with Marinelli after the lunchbreak, advised the Company's president that a majority of the employees had signed cards for the Union, and asked that he discuss this situation with them, Marinelli told the men to forget about the Union, that there would be no union in his plant, he would run the shop the way he saw fit, and before a union came in he would close the plant doors. Thereafter, while the walkout was in progress Marinelli offered to post some proposals relating to working conditions and have the men vote on what they wanted, telling the men they could get a committee or some kind of organization. Following the walkout, when the men offered to return to work, Marinelli attempted to have the men line up so as to show support for the Union or Respondent. Marinelli again threatened to close the plant, said the men who had led the walkout were fired, suggested the formation of the Employees Grievance Committee, and later that evening fired four employees for "instigating a wildcat strike." On June 23 Respondent discharged four more employees because they showed support for the employees discharged on June 22, and later that day instigated and promoted the formation of the Committee, a dominated labor organization, conducted an election for committeemen for the

37. 395 U.S. 575, 616.

Committee, and began bargaining with the Committee concerning the employees' working conditions and wages. Finally, on July 2 all or substantially all of the employees received a wage increase which Respondent had negotiated with the Committee. Though not in response to the demand for recognition, Respondent's massive violations of Section 8(a)(1) in February, following discovery of the organizing campaign as well as the discharges of Callahan and Lengyel followed by the violations in June detailed above, demonstrate Respondent's recidivist tendencies. In *Gissell Packing*[38] the Court looked to this as another factor supporting a bargaining order, stating:

> In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of the employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future.

"Respondent's course of unlawful conduct has demonstrated . . . a propensity to engage in violations of the Act by their nature designed to undermine the Union's support among the employees. Its unfair labor practices were so flagrant and coercive in nature as to require, even in the absence of a Section 8(a)(5) violation, a bargaining order to repair their effect. . . . in any event . . . Respondent's unfair labor practices were of such a pervasive character as to make it unlikely that their coercive effects would be neutralized by conventional remedies so as to produce a fair election. In these circumstances, [I] believe that employee sentiment as ex-

38. 395 U.S. 575, 614.

pressed through the authorization cards is a more reliable measure of their desires on the issue of representation in this case than an election would be. [I] therefore find that by refusing to bargain with the Union and engaging in extensive unfair labor practices, Respondent violated Section 8(a)(5) and (1), and that to effectuate the policies of the Act, a bargaining order is required to remedy its refusal to bargain as well as its other unfair labor practices." [Footnotes omitted.] *Medley Distilling Company, Inc., supra.*

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Company set forth in section III, above, occurring in connection with the Company's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged Edward Callahan, Albert Lengyel, Walter Korab, William Summerville, Clair Catterson, Robert Jones, Frank Genareo, Joseph Todd, Randall Rubeis, and Donald Marcarella, I shall recommend that Re-

spondent be ordered to reinstate the named employees to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges,[39] and to make them whole for any loss of pay they may have suffered as a result of Respondent's unlawful conduct. Backpay shall be computed in the manner set forth in *F. W. Woodworth Company,* 90 NLRB 289, with interest added thereto in the manner set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

As to the Employees Grievance Committee, having found that the Respondent dominated and interfered with its formation and administration, I shall recommend that the Company be ordered to withdraw recognition from and completely disestablish the Committee.

Having found that the Union represented a majority of Respondent's employees in an appropriate bargaining unit and that its demands for recognition and bargaining were unlawfully refused, I shall recommend that the Company be ordered to bargain, upon request, with the Union and to embody any agreement reached in a written signed agreement.

Respondent's unfair labor practices indicate an attitude of opposition to the purposes of the Act generally. Accordingly, a broad cease-and-desist order is necessary and appropriate to effectuate the policies of the Act.

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39. From the record it appears that all of the discharged employees were subsequently reemployed by the Company. However, on the record in this case it is impossible to determine whether that reemployment constituted reinstatement within the meaning of the recommended remedy.

CONCLUSIONS OF LAW

1. City Welding & Manufacturing Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, District No. 106, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in certain described conduct referred to hereinabove in section III, C, D, E, F, and H, hereof, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed to them in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By engaging in the conduct described in section III, H, hereof, Respondent has dominated and interfered with the formation and administration of the Employees Grievance Committee, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act.

5. By engaging in the conduct described in section III, C, E, F, and G, hereof, Respondent discriminated against Edward Callahan, Albert Lengyel, Walter Korab, William Summerville, Clair Catterson, Robert Jones, Frank Genareo, Joseph Todd, Randall Rubeis, and Donald Marcarella in regard to the terms and conditions of their employment, in order to discourage activities protected by Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

6. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed at the Respondent's New Castle, Pennsylvania, plant excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

7. On and at all times since June 19, 1970, the Union has been the exclusive bargaining representative of the employees in the aforesaid collective-bargaining unit.

8. By refusing on and after June 19, 1970, to recognize and bargain collectively with the Union, as the exclusive bargaining representative of the employees in an appropriate bargaining unit, Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[40]

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40. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, City Welding & Manufacturing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Creating the impression of surveillance of the employees' union activities; threatening employees with demotions and wage decreases if they select the Union as their bargaining representative; threatening plant closure if the Union is selected as the employees' bargaining representative; asking employees to turn in to the Respondent their union authorization cards; questioning employees about their own union activities and feelings and those of their fellow employees; and granting wage increases in order to dissuade the employees from joining or supporting the Union.

(b) Dominating or interfering with the formation and administration of the Employees Grievance Committee or any other labor organization of its employees.

(c) Discouraging membership in the Union, or in any other labor organization, by discriminating against employees in regard to the terms and conditions of their employment.

(d) Refusing to recognize and bargain collectively with International Association of Machinists and Aerospace Workers, District No. 106, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed at the Respondent's New Castle, Pennsylvania, plant, excluding office clerical employees and

guards, professional employees and supervisors as defined in the Act.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively with International Association of Machinists and Aerospace Workers, District No. 106, AFL-CIO, as the exclusive representative of all production and maintenance employees employed at the Respondent's New Castle, Pennsylvania, plant, excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement.

(b) Permanently withdraw from the Employees Grievance Committee, or any successor thereto, all recognition as representative of Respondent's employees for treating or dealing with Respondent in respect to grievances, wages, earnings, or other terms and conditions of employment, and completely disestablish it as such representative.

(c) Offer Edward Callahan, Albert Lengyel, Walter Korab, William Summerville, Clair Catterson, Robert Jones, Frank Genareo, Joseph Todd, Randall Rubeis, and Donald Marcarella, to the extent that it has not already done so, immediate and full reinstatement to

their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of Respondent's discrimination against them as set forth in the section of this Decision entitled "The Remedy."

(d) Notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(f) Post at its New Castle, Pennsylvania, plant copies of the attached notice marked "Appendix C."[41] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in con-

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41. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

spicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 6, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[42]

Dated at Washington, D.C.

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42. In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX A

Raymond Forkey
Angelo Feola
Alfred Oliva
William Summerville
James Burke
Anthony Fundoots
Edward Bucker
Matteo Reino
Antonio Fusco
Raymond Karns
Albert Reno
Mariano Simeone
Timothy Burns
Anthony Angelo
Anthony Antuono
Curtis Crill
Arthur DiCola, Jr.
Richard Shaffer
David Duddy
Al Lengyel
Constant Evanoski
Edward Callahan
Glenn Blews
Steve Hallowich
Steve DeGennaro
Michele Schettino
Louis Napolitano
Robert Jones
William Miller
Randell Rubeis
John Widelko
Donald Marcarella
Frank Genareo
Jerry Passerrello
Joseph Todd
Salvatore Schettino
Larry Marshall
Donald Haben
Lewis Mitten
Robert Cioffi
Gerald Maggie
Walter Korab
James DeRosa
Joseph Sabino
Robert Druschel
Glenn Tanner
Anthony Masone
Donato Circelli
Raymond Attisano
Joseph Tuscano
Harold Forkey
Stanley Walczak
Clair Catterson

APPENDIX B

Name	Date of Card	Valid at Time of 6/19 Demand	Valid at Time of 6/22 Demand
Angelo	June 18	—	—
Antuono	June 18	X	X
Attisano	June 18	X	X
Bucker	Feb. 7	X	X
Burke	Feb. 6	X	X
Burns	Feb. 16	X	X
Callahan	Feb. 5	X	X
Catterson	Feb. 6	X	X
Crill	Feb. 11	X	X
DeGennero	June 22	—	—
DeRosa	Feb. 11	X	X
Duddy	Feb. 20	X	X
Evanoski	June 19	—	X
Harold Forkey	June 18	X	X
Ray Forkey	June 18	X	X
Fundoots	June 17	X	X
Genareo	Feb. 20	X	X
Haben	June 18	X	X
Jones	June 18	X	X
Korab	Feb. 11	X	X
Lengyel	Feb. 9	X	X
Macarella	June 18	X	X
Maggie	Feb. 17	X	X
Marshall	Feb. 6	X	X
Napolitano	March 6	—	—
Passerrello	June 18	X	X
Reno	June 19	X	X
Rubeis	Feb. 19	X	X
Schettino	June 22	—	—

Name	Date of Card	Valid at Time of 6/19 Demand	Valid at Time of 6/22 Demand
Simeone	Feb. 10	X	X
Summerville	Feb. 11	X	X
Tanner	June 22	—	X
Todd	June 18	X	X
Tuscano	June 19	X	X
Walczak	June 18	X	X
Widelko	Feb. 6	X	X

APPENDIX C

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We hereby notify our employees that:

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT say or act in such a way as to make our employees think we are spying on their union activities.

WE WILL NOT threaten our employees with demotions or less pay if they select the International Association of Machinists and Aerospace Workers, District No. 106, AFL-CIO, as their bargaining representative.

WE WILL NOT threaten to close the plant if our employees select that Union as their bargaining representative.

WE WILL NOT ask our employees to turn their union cards in to the Company.

WE WILL NOT question employees about their union activities or feelings or the union activities and feelings of other employees.

WE WILL NOT grant wages increases to keep our employees from joining or supporting the Union.

WE WILL NOT discharge or in any way discriminate against any of our employees because of their membership in, sympathy for, or activities on behalf of the International Association of Machinists and Aerospace Workers, District No. 106, AFL-CIO, or because they engage in any activities of mutual self-help.

WE WILL NOT in any other manner interfere with our employees in exercising their rights to join or assist, or to refrain from joining or assisting, any union, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer Edward Callahan, Albert Lengyel, Walter Korab, William Summerville, Clair Catterson, Robert Jones, Frank Genareo, Joseph Todd, Randall Rubeis, and Donald Marcarella their jobs back with backpay.

WE WILL, upon request, bargain with the International Association of Machinists and Aerospace Workers, District No. 106, AFL-CIO, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages,

hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees employed at the Respondent's New Castle, Pennsylvania, plant excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

CITY WELDING &
MANUFACTURING COMPANY
(Employer)

Dated ..... By.....
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, 15222, Telephone 412-644-2977.

APPENDIX B

191 NLRB No. 30

D-5209
New Castle, Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CITY WELDING & MANUFACTURING COMPANY and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT NO. 106, AFL-CIO and EMPLOYEE GRIEVANCE COMMITTEE	Case 6 CA-5019

DECISION AND ORDER

On February 26, 1971, Trial Examiner Arthur M. Goldberg issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations[1] of the Trial Examiner.[2]

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1. While Chairman Miller agrees that a bargaining order is appropriate herein, he would, for reasons stated in his separate concurrence in *United Packing Company of Iowa, Inc.*, 187 NLRB No. 132, predicate this remedy solely upon the extensive 8(a)(1), (2), and (3) violations found herein.

2. In section III of his Decision, under the classification "J. The Union's Majority," the Trial Examiner stated that 16 of the cards received in evidence were "unaffected by any testimony affecting their validity as unambiguous authorizations for the Union to represent the employees signing those cards." In fact, two of these cards were challenged by the Respondent as being invalid, namely, the cards of Jerry Passerrello and Curtis Crill. However, as failure to count these cards will have no effect upon the Union's majority at any time material, we find it unnecessary to pass upon the issues raised with respect to them.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2151

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

CITY WELDING & MANUFACTURING COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued June 23, 1972

Before: HASTIE, J. ROSEN and HUNTER, *Circuit Judges.*

OPINION OF THE COURT

[Filed July 6, 1972]

PER CURIAM:

The National Labor Relations Board has asked this court to enforce an order that the Board entered against City Welding & Manufacturing Company, an employer, pursuant to findings of numerous violations of the National Labor Relations Act, as amended.

Almost all of the wrongs with which the employer is charged were improprieties connected with its efforts to prevent the unionization of its plant. Our examination of the record satisfies us that the evidence sufficed to support the Board's findings that these wrongs occurred as charged.

The employer urges most strongly that so much of the Board's order as requires it to recognize and bargain with the union should not be enforced. It is argued that the authorization cards signed by a majority of the eligible employees were ambiguous and that employees did not understand the significance of signing the cards. Each card read as follows:

> "I, the undersigned employee of
> (Company) _____
> authorize the International Association of Machinists and Aerospace Workers (IAM) to act as my collective bargaining agent for wages, hours and working conditions. I agree that this card may be used either to support a demand for recognition or an NLRB election, at the discretion of the union . . . "

Like the Board, we find no ambiguity in this language. In the same connection the Board found on conflicting testimony that, contrary to the employer's contention, employees were not induced to sign cards by misrepresentation as to their purpose. The Board's findings were supported by substantial evidence.

Finally, in ordering the employer to bargain with the union the Board attempted to apply the rationale of *N.L.R.B. v. Gissell Packing Co.*, 1969, 395 U.S. 575. On the facts permissibly found by the Board, the bargaining order is supported by *Gissell Packing*.

The order of the Board will be enforced in its entirety.

. . . . . .

To the Clerk:

Please file the foregoing opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CITY WELDING & MANUFACTURING COMPANY,
Respondent.

No. 71-2151

JUDGMENT

Before: Hastie, J. Rosen and Hunter, *Circuit Judges.*

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, City Welding & Manufacturing Company, its officers, agents, successors, and assigns on June 14, 1971, and a corrected Order of June 21, 1971. The Court heard argument of respective counsel on June 23, 1972, and has considered the briefs and transcript of the record filed in this cause. On July 6, 1972, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order in its entirety.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, City Welding & Manufacturing Com-

pany, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

BY THE COURT

WILLIAM H. HASTIE [SEAL]
Circuit Judge

DATED: August 28, 1972

APPENDIX E

STATUTES INVOLVED

Sections 8 (a)(1), (2), (3), (5), 10(e) and (f) of the Labor Management Relations Act of 1947 (29 U.S.C. §§151 et. seq.) read as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. [49 Stat. 452, 29 U. S. Code, Sec. 158 (1).]

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, that subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay. [49 Stat. 452, 29 U. S. Code, Sec. 158 (2).]

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. [49 Stat. 452, 29 U. S. Code, Sec.

158 (3), as amended by P. L. 101, 80th Cong., 1st Sess. and P. L. 189, 82nd Cong., 1st Sess.]

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a). [49 Stat. 452, 29 U. S. Code, Sec. 158(5).]

Section 10:

(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record con-

sidered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28. (U. S. C., title 28, secs. 346 and 347) [49 Stat. 453, 29 U. S. Code, Sec. 160(e), as amended by P. L. 101, 80th Cong., 1st Sess.]

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (c), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. [49 Stat. 453, 29 U. S. Code, Sec. 160 (f), as amended by P. L. 101, 80th Cong., 1st Sess.]

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-776

CITY WELDING & MANUFACTURING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. In an unfair labor practice proceeding, the National Labor Relations Board found that petitioner ("the Company") had violated Section 8(a) (1), (2) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a) (1), (2) and (3), by interfering with the rights of its employees to engage in union activities; dominating and interfering with the formation and administration of an employees grievance committee; and discharging ten employees because of their union activities (Pet. App. 43–44, 47, 51, 57, 59, 62–63). The Board further found that the Union[1] had obtained

[1] International Association of Machinists and Aerospace Workers District No. 106, AFL–CIO.

492-907—73

valid authorization cards from a majority of the employees in an appropriate unit (Pet. App. 84), and that, in view of the extensive unfair labor practices, the Company violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union (Pet. App. 85, 88). The Board ordered the Company to cease and desist from the unfair labor practices found; to reinstate with backpay the ten discharged employees; to dissolve the company dominated employees grievance committee; and to bargain with the Union upon request (Pet. App. 88–89). On the Board's petition the court of appeals enforced the Board's order in full (Pet. App. 103–104).

2. Petitioner does not challenge the Board's findings that it violated Section 8(a) (1), (2), and (3) of the Act, and that it refused to bargain with the Union. Instead, it contends that the Board's bargaining order was improper under this Court's decision in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. In our view, this contention is insubstantial and further review of the Board's order is unwarranted.

a. Petitioner contends (Pet. 8–11) that the authorization cards did not clearly authorize the Union to represent the employees for collective bargaining, but were instead "dual-purpose" cards which led the employees to believe that they would have a representation election. However, although this Court in *Gissel* made "no decision as to the conflicting approaches used with regard to dual-purpose cards" (395 U.S. at 606), it stated that "employees should be

bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to divert the signer to disregard and forget the language above his signature" (*ibid.*).[2] In the instant case, the cards in question were labeled "YES, I WANT THE IAM," and stated clearly that the Union was authorized to act as the signers' collective bargaining agent. Although the cards also stated that they might be used to compel a representation election, they made clear that the choice whether to seek an election or to seek outright recognition on the basis of the cards was "at the discretion of the union" (Pet. App. 65). Under these circumstances, the court below correctly concluded that the cards were not ambiguous (Pet. App. 104).[3]

b. Petitioner also contends (Pet. 14–17) that the Board based its bargaining order solely on the Com-

[2] The Court also pointed out that "[t]here is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election," since elections are held in a vast majority of cases, and the union can obtain an election with cards from 30 percent of the employees if the employer refuses the bargaining demand. 395 U.S. at 606–607.

[3] Similarly, the Company's further contention (Pet. 11) that the Union, in soliciting employee signatures, misrepresented the purpose of the authorization cards is not supported by the record. The Trial Examiner, whose findings were accepted by the Board and the court below, discredited assertions that the Union representative either threatened employees, or informed them that their cards would be used only to obtain an election (Pet. App. 68–84).

pany's refusal to bargain, and failed to determine whether such an order was necessary to remedy the Company's other unfair labor practices, as required by *Gissel, supra.* The Trial Examiner, however, whose decision the Board adopted, specifically found that a bargaining order was necessary not only to remedy the Company's refusal to bargain, but also because the violations of Section 8(a) (1), (2) and (3) of the Act were "so flagrant and coercive in nature as to require, even in the absence of an 8(a)(5) violation, a bargaining order to repair their effect" (Pet. App. 85, 87).[4] Accordingly, the bargaining order was warranted under the *Gissel* standards. 395 U.S. at 613–616.[5]

It is therefore respectively submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JANUARY 1973.

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[4] The Examiner further found (Pet. App. 87) that: "'Respondent's unfair labor practices were of such a pervasive character as to make it unlikely that their coercive effects would be neutralized by conventional remedies so as to provide a fair election'" (quoting from *Medley Distilling Co.*, 187 NLRB No. 12).

[5] The Company's contention (Pet. 11–14) that different standards have been applied by the courts of appeals in approving Board bargaining orders is without merit, since the cases cited involved distinguishable factual circumstances from those present here.

U.S. GOVERNMENT PRINTING OFFICE: 1973